

Marlon Lorenzo Brown  
Name

1289358  
Prison Number

Northern Nevada Correctional Center  
Place of Confinement

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

Marlon Lorenzo Brown, Petitioner, )  
(Full Name) )

vs. )

CASE NO. \_\_\_\_\_  
(To be supplied by the Clerk)

N. Breitenbach, warden, Respondent, )  
(Name of Warden, Superintendent, jailor or )  
authorized person having custody of petitioner) )

and )

The Attorney General of the State of Nevada )

PETITION FOR A  
WRIT OF HABEAS CORPUS  
PURSUANT TO 28 U.S.C. § 2254  
BY A PERSON IN STATE CUSTODY  
( NOT SENTENCED TO DEATH)

1. Name and location of court, and name of judge, that entered the judgment of conviction you are challenging: 8<sup>th</sup> Judicial District, Clark County, Nevada, Judge Michelle Lewitt.
2. Full date judgment of conviction was entered: 12 / 17 / 18. (month/day/year) Amended 2/27/19
3. Did you appeal the conviction? ☒ Yes \_\_\_ No. Date appeal decided: 6 / 24 / 20.
4. Did you file a petition for post-conviction relief or petition for habeas corpus in the state court?  
☒ Yes \_\_\_ No. If yes, name the court and date the petition was filed: 8<sup>th</sup> Judicial District Court 2 / 25 / 19. Did you appeal from the denial of the petition for post-conviction relief or petition for writ of habeas corpus? ☒ Yes \_\_\_ No. Date the appeal was decided: 4 / 10 / 20. Have all of the grounds stated in this petition been presented to the state supreme court? ☒ Yes \_\_\_ No. If no, which grounds have not? \_\_\_\_\_
5. Date you are mailing (or handing to correctional officer) this petition to this court: 4 / 18 / 23.  
Attach to this petition a copy of all state court written decisions regarding this conviction.

See Exhibits A through D

6. Is this the first federal petition for writ of habeas corpus challenging this conviction? ☒ Yes  
 \_\_\_ No. If no, what was the prior case number? N/A. And in what court was  
 the prior action filed? N/A  
 Was the prior action N/A denied on the merits or N/A dismissed for procedural reasons (check  
 one). Date of decision: N/A / \_\_\_ / \_\_\_. Are any of the issues in this petition raised in the  
 prior petition? N/A Yes \_\_\_ No. If the prior case was denied on the merits, has the Ninth  
 Circuit Court of Appeals given you permission to file this successive petition? N/A Yes \_\_\_ No.
7. Do you have any petition, application, motion or appeal (or by any other means) now pending in  
 any court regarding the conviction that you are challenging in this action? \_\_\_ Yes ☒ No.  
 If yes, state the name of the court and the nature of the proceedings: N/A
8. Case number of the judgment of conviction being challenged: C-14-381675-1
9. Length and terms of sentence(s): 176 months minimum to 540 months maximum
10. Start date and projected release date: April 1<sup>st</sup> 2016 - December 1<sup>st</sup> 2038
11. What was (were) the offense(s) for which you were convicted: Battery with use, Battery  
w/ use constituting dom result sub bot harm x2, Assault w deadly, discharge of firearm x6
12. What was your plea? \_\_\_ Guilty ☒ Not Guilty \_\_\_ Nolo Contendere. If you pleaded guilty  
by reason of insanity or nolo contendere pursuant to a plea bargain, state the terms and conditions of the agreement:
13. Who was the attorney that represented you in the proceedings in state court? Identify whether  
 the attorney was appointed, retained, or whether you represented yourself *pro se* (without counsel).

	Name of Attorney	Appointed	Retained	<i>Pro se</i>
arraignment and plea	<u>Damian Sheets</u>	___	<input checked="" type="checkbox"/>	___
trial/guilty plea	<u>Erika Ballar / Connor Slife</u>	<input checked="" type="checkbox"/>	___	___
sentencing	<u>Craig Mueller</u>	___	<input checked="" type="checkbox"/>	___
direct appeal	<u>Craig Mueller</u>	___	<input checked="" type="checkbox"/>	___
1st post-conviction petition	<u>Marlon Brown</u>	___	___	<input checked="" type="checkbox"/>
appeal from post conviction	<u>Marlon Brown</u>	___	___	<input checked="" type="checkbox"/>
2nd post-conviction petition	<u>Marlon Brown</u>	___	___	<input checked="" type="checkbox"/>
appeal from 2nd post-conviction	<u>N/A</u>	___	___	___
3 <sup>rd</sup> post-conviction petition	<u>Michael Michael McAvoy Amayo</u>	___	<input checked="" type="checkbox"/>	___
appeal from 3 <sup>rd</sup> post conviction	<u>Michael McAvoy Amayo</u>	___	<input checked="" type="checkbox"/>	___

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### Relevant History (to all counts)

A review of the facts of this case is necessary as they span over nine years and have been very eventful. Understanding the procedural history involved in this case will show why the Nevada Supreme Court's rulings concerning procedural bars is in correct, and will in fact show the Nevada Supreme Court has passed upon the opportunity to correct the Constitutional violations that occurred during the prosecution of this case.

#### I. Pretrial

On August 30<sup>th</sup> 2014, Petitioner was arrested and charged with (1) count of discharge of a firearm at or into an occupied structure, and (1) count of battery with the use of a deadly weapon constituting domestic violence. A few days later, Petitioner was arraigned in front of Justice of the Peace Melanie Tabiasson. The state added one more count of battery with the use of a deadly weapon constituting domestic violence. Judge Tabiasson then set bail at \$60,000. Petitioner posted bail and was released September 8<sup>th</sup> 2014.

Preliminary hearing was originally set for a couple weeks after the arraignment, however, it was continued until October 2014. At the hearing, at which time Petitioner was represented by retained counsel Damion Sheets, the victim Margaret Aguirre's version of events changed drastically resulting in the state adding a total of 15 more charges, many of them duplicate. The State then attempted to get Petitioner's bail raised to \$180,000 (Attempt #1) in an effort to get him remanded into custody. Judge Tabiasson stated on the record that she was appalled that Petitioner was released on bail (despite the fact she's the one who set bail), however, she noted that Petitioner had made



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all his court appearances and stayed out of trouble so therefore, she would not be raising the bail. She then added the condition of house arrest to Petitioner's bail, and bound him over to District Court on all 18 felony counts.

Once in District Court, Petitioner's case was assigned to Judge James Bixler. Petitioner filed a motion to be removed from house arrest as it was not an original condition of bail and Petitioner felt it was added in malice. The State filed a counter motion to increase bail (Attempt #3), this time requesting an increase to \$350,000. At the December 2<sup>nd</sup> 2014, hearing on these motions, Judge Bixler denied both motions, refusing the States second request to increase bail as no reason existed.

Judge Bixler retired soon after this hearing. Petitioner case was then transferred to Judge Jennifer Togliatti.

#### Illegal Arrest #1 / Excessive bail increase #1

On April 1<sup>st</sup> 2016, Judge Togliatti signed an order removing Petitioner from house arrest from April 1<sup>st</sup> - 3<sup>rd</sup> 2016 to travel to California (Details will be discussed further later in the Petition), however, Petitioner was remanded into custody on this date for an alleged alcohol violation.

Petitioner never received formal notice of what he was being remanded for, nor did the state prove any violations in connection with this arrest. However, the State filed a duplicate motion to increase bail (Attempt #3), that had already been denied twice before, and Judge Togliatti granted the motion without giving any cause. Petitioner bail was excessively increased to \$350,000 after he had been at liberty on bail for over a year and a half, stayed out of trouble and made all of his court appearances. Petitioner posted the \$350,000 bail through Michael Shyman and

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Easy Bail Inc, then was released on house arrest June 3<sup>rd</sup> 2016.

### Illegal Arrest #2 / Police Misconduct

On October 3<sup>rd</sup> 2016, several officers from LVMPD and metro house arrest showed up to Petitioner's residence and remanded him into custody without cause or warrant (The details of this arrest will be discussed later in this petition.) LVMPD told Petitioner his bail had been revoked by his bonding company. Petitioner filed a complaint shortly after being remanded against the bonding company as he felt foul play was involved. The Nevada Division of Insurance began investigating the complaint in October 2014.

Counsel for Petitioner filed a motion to address Petitioner's custody status. The first of several hearings was held on November 1<sup>st</sup> 2016.

During this hearing it was relayed to the court that Petitioner was in custody due to a bond surrender. Instead of requiring the bonding company to take the correct procedures when surrendering a defendant which would be to show cause for the surrender, Judge Togliatti allowed the State prosecutor to call the bondsman and relay to the court what was said.

At the next court hearing, the State relayed to the Court that Petitioner's bond was surrendered because Petitioner allegedly threatened a co-signer and had plans to "escape" house arrest in the near future because he was in fear of being arrested in connection with a homicide that occurred in the parking lot of Petitioner's place of business. No details were given, and the bondsman nor a co-signer ever came to court to corroborate anything that was said by the State. It was also said in court that Petitioner's \$350,000 bond had not been



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exonerated, so even though Petitioner still had a completely valid bond outstanding in the amount of \$350,000 pursuant to NRS 178.502(2)(b)), Judge Tagliatti ordered Petitioner held with no bail, and said if someone was willing to post \$350,000 bail, a source hearing would need to be held (November 3<sup>rd</sup> 2016 court date).

Petitioner remained illegally incarcerated despite counsel presenting an affidavit from the co-signers on Petitioner's bond saying the representations by Mr. Slyman concerning them were false.

The investigation went on concerning Petitioner's arrest. Counsel for Petitioner attempted to file multiple motions to get the circumstances of Petitioner's surrender addressed by the court after learning from the investigators that because LUMPD officers were the ones who actually made the arrest, it did not truly qualify as a valid bond surrender, it was actually an arrest by the police. The Court refused to address Petitioner's custody. In fact, when the last of these hearings was held on June 6<sup>th</sup> 2017, and Petitioner informed the court that he was being illegally imprisoned because LUMPD was the ones who made the arrest, not the bondsman, the Court ordered the custody records from the jail and continued the hearing.

#### Fraud on the Court / No Bail Hold / Due Process violation

On July 20<sup>th</sup> 2017, the hearing was back on calendar concerning the custody records. Judge Tagliatti noted that she had received the TCR (Temporary Custody Records) from October 4<sup>th</sup> 2016, which indicated a bond surrender at 11:00 am. She then ordered Petitioner's \$350,000 bond exonerated without notice or cause. She also order Petitioner to be held with No Bail without notice or cause. LUMPD clearly sent over fraudulent

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paperwork to the court representing that Petitioner had been surrendered on October 4<sup>th</sup> 2016 by Mr. Slyman to cover up the illegal arrest they performed the day earlier on October 3<sup>rd</sup> 2016. Petitioner never had a hearing concerning why he was arrested.

### Attempts to file Habeas Corpus Petitions

During this illegal incarceration, Petitioner attempted to file multiple petitions for writ of Habeas Corpus. Petitioner was represented by counsel who refused to file the writ in the lower court so he filed an original writ with the Nevada Court of Appeals (Case # 73615-CON). The Court of Appeals declined to exercise original jurisdiction, and did not address the merits. While that petition was pending, Petitioner filed three petitions in this court, Case # 2:17-CV-02644-MMD-GWF and 2:17-CV-02708-JCM-GWF (both dismissed for failure to pay filing fee or file application to proceed in forma pauperis), and 2:17-CV-02811-GMN-UCF (dismissed pursuant to younger abstention and failure to exhaust state remedies. This action was dismissed without prejudice).

Petitioner then filed a civil rights 1983 action (Civil suit case # 2:17-CV-02396-AP6-PAL) with identical causes of action as the aforementioned Habeas Petitions (illegal arrest, Due Process violations, excessive bail increases, and no bail holds). The complaint remained pending a screening order.

### Constructive denial of paid counsel of choice

#### Excessive bail increase #2

While illegally imprisoned, Petitioner was unable to continue running his business which caused the business to fail. This caused Petitioner's retained counsel to motion to withdraw the week his trial was to commence



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28. Petitioner could no longer afford to pay for his defense as a result of the illegal incarceration. Judge Tagliatti granted the motion to withdraw and vacated trial at calendar call against Petitioner's objection. She then appointed the Public Defenders office to represent petitioner and scheduled trial for a few months after the appointment.

Petitioner relayed to new counsel Erika Ballou and Connor Slike from the Public Defenders office, the history of his custody and asked them to file a writ of Habeas Corpus. They refused, however, they did notice Petitioner was being held with No Bail, and filed a motion to set reasonable bail or O.R. release. The motion was heard on December 8<sup>th</sup> 2017. At the hearing, Judge Tagliatti noted that yes Petitioner did have a Constitutional right to bail, and was being held with No Bail. She then increased bail again without cause to One Million dollars, all while Petitioner was still being illegally imprisoned.

## II

## Trial

Trial was set for March 3<sup>rd</sup> 2018, Counsel had minimum time to prepare and had a heavy caseload with back to back trials. The trial was transferred from Judge Tagliatti's courtroom to Judge Michelle Casutt's courtroom as Judge Tagliatti had a trial scheduled that took precedence. This case was an insanity case, so counsel filed a motion for a pre trial ruling on jury instructions having to do with the planned insanity defense. During the hearing on the motion, Judge Casutt made representations that the proposed instructions would be given, she then with counsel's blessings deferred the official ruling until a later time.

Trial commenced, trial counsel did not cross examine majority of the states witnesses, nor did they challenge the states version of events.

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In fact, trial counsel actually conceded the States version of events, which meant impeachment of Petitioners version of events as told by Petitioners expert (and most important) witness, Dr. Boyd, against Petitioners objection.

Evidence existed in discovery in the form of a Police body cam interview with the victim the day of the incident that corroborated Petitioners version of events. Trial counsel refused to show the jury this evidence during trial. In this video, the victim says she was accidentally shot in the leg as Petitioner was shooting at phantom people in the opposite direction of her and Petitioner, when they both fell to the floor. The importance of this version of events is, when it came time to settle jury instructions, Judge Leavitt, after the State presented their case without being challenged, refused to give NREI instructions, or allow trial counsel to argue that Petitioner was not guilty by reason of insanity. Her reasoning was, even if Petitioner was in a delusion that he was in war, you still can not shoot an unarmed combatant in the leg to prevent them from fleeing (Counsel's version of events). Had counsel argued that evidence was presented by Dr. Boyd, that the victim was not intentionally shot, and that Petitioner was defending himself against what he perceived was actively trying to kill him, Judge Leavitt's reasoning for not allowing the instructions would not have been anywhere close to valid. However, counsel did not argue Petitioners version of events, but instead attempted to argue why it would be justified to shoot a fleeing combatant.

At the conclusion of trial, the juries options were (1) Not guilty or (2) guilty. After a six day trial of the States uncontested version of events,



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Petitioner was found guilty on all 12 counts he was tried for.

After trial, Petitioner asked counsel to file a motion for new trial and a Habeas Corpus pursuant to NRS 34.508 addressing the forementioned Constitutional violations. Counsel was busy with other trials they had scheduled back to back so a motion for new trial was not filed. Petitioner attempted to file the motion himself, which was rejected by the clerk of the court as there was counsel of record on Petitioner's case.

Trial counsel did tell Petitioner to draft the Habeas Petition and they would file it. Petitioner drafted the Habeas, raising the issue of his illegal pretrial confinement, excessive bail, no bail holds as well as counsel's failure to cross examine the states witnesses and show the body cam interview with the victim corroborating Petitioner's version of events for impeachment purposes. Counsel filed the petition May 3<sup>rd</sup> 2018.

At the May 22<sup>nd</sup> 2018, hearing, Judge Leavitt refused to hear the petition calling it a fugitive document, then took it off esender, even though Counsel filed it and asked Judge Leavitt to rule on it.

On the advise of counsel, Petitioner then filed a motion to dismiss Counsel, and refiled the Habeas Petition along with the motion on May 29<sup>th</sup> 2018. Judge Leavitt entered a minute order once again calling the Petition a fugitive document on June 14<sup>th</sup> 2018, then refused to set a hearing date even though the petition was filed with a motion to dismiss counsel.

When the hearing came up on the motion to dismiss counsel, Judge Leavitt made it clear that even if Petitioner was to dismiss counsel, she still would not hear the Habeas Petition calling it "inappropriate" or "improper". Petitioner then retained Craig Mueller (Appellate attorney) to file

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the writ.

On September 11<sup>th</sup> 2018, Ms. Hinds from Craig Muellers law firm made an appearance and informed the court a motion for new trial would be filed and requested transcripts from trial. Judge Leavitt accommodated the preparation of the transcripts. Once the transcripts were produced and Mr. Mueller requested a briefing schedule be set for the motion for new trial during a November 13<sup>th</sup> 2018 hearing, the State all of a sudden objected saying the time had passed to file the motion. Judge Leavitt agreed with the State, so did Mr. Mueller, then in open court Mr. Mueller said he would bring the issues up on appeal. A date was then set for Petitioner to be sentenced.

### Sentencing

At sentencing on December 11<sup>th</sup> 2018, Judge Leavitt pronounced several individual sentences, then sentenced Petitioner to serve an aggregate sentence of 116 to 368 months. After sentence was pronounced, Petitioner requested Judge Leavitt to set a date to hear the Habeas Corpus Petition that was previously filed but not ruled on. Mr. Mueller once again said he would take care of it, Judge Leavitt told Petitioner he was free to file an appeal or post conviction petition for relief once the judgment of conviction was filed. The judgment of conviction was filed December 18<sup>th</sup> 2018. A notice of appeal was filed January 16<sup>th</sup> 2019.

### III

#### Habeas Corpus Petition #1

On February 7<sup>th</sup> 2019, a screening order was filed by this court in the forementioned civil rights lawsuit (2:17-cv-02396-APG-PAL). The magistrate Judge, Peggy Leen, noted that Petitioner was in the custody of Nevada Department of Corrections, and was suing for violations that

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occurred prior to arrest, and while incarcerated at Clark County Detention Center. The Judge then took notice of all the forementioned Habeas Petitions that Petitioner filed in the Nevada Court of Appeals, as well as this court, with nearly identical issues and causes of action as the civil rights complaint. The magistrate then recommended dismissal without prejudice as "These allegations fall within the core of Habeas Corpus" and "Specific Habeas Corpus Statutes and remedies clearly apply to these counts/allegations." She then cited *Wilkinson* 544 U.S. at 78. District Judge Andrew Gordon adopted the recommendation in its entirety.

Once Petitioner received the screening order confirming he has been taking the correct legal actions to get relief from these violations, he immediately drafted a habeas petition once again with identical causes of action, then filed it in Clark County District Court, as this Court said Petitioners state remedies needed to be exhausted before it could entertain a 2254 petition. The petition was filed February 25<sup>th</sup> 2019, given case # A-19-798863-W, and assigned to Judge Leavitt.

Judge Leavitt filed an amended judgment of conviction increasing the aggregate sentence she pronounced at sentencing and wrote in the original judgment by 5-15 years while it was under appeal.

After a couple of continuances, the petition came up for hearing. For this hearing, Petitioner was transported from Southern Desert Correctional Center.

Also present was Jay Maynard, an attorney from Craig Muellers law firm whom made representations to the court that they would like the petition stayed pending resolution of the Direct appeal that still had yet to be filed.

The problem with this is, Petitioner had spoken with Mr. Mueller a couple days before the hearing at which time it was agreed upon that the issues contained



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Within the petition were valid issues that needed to be litigated, which is why Petitioner had been transported from NSOC for the hearing (Mr. Mueller got the order for transport in himself). However, sometime between the conversation with Petitioner that led to the order for transport, and the hearing, Mr. Mueller decided not to show up to litigate the petition, and sent his associate to make the representation.

Judge Leavitt then told Petitioner that he should stay the petition until his Direct Appeal has concluded, and reminded Petitioner that he only gets one post conviction petition. Petitioner then stated that he understood that you only get one post conviction petition litigated all the way through on the merits (Emphasis Added). Judge Leavitt then noted that Petitioner did not request an attorney, and asked if he would like one to review the record. Petitioner confirmed he did not want an attorney and this is why. The petition is based on an illegal arrest that lasted 889 days. The damages resulting from this illegal arrest is substantial and led to multiple other constitutional violations. At the time of this hearing, Petitioner had attempted multiple times, to have these violations addressed and cured through multiple attorneys, and in front of more than one judge without success. Judge Leavitt herself took a properly filed petition for Habeas Corpus "off calendar" to avoid having to address the merits and prevent appellate review.

This illegal arrest ended up causing Petitioner to become indigent, which derailed his entire defensive strategy when his counsel of choice was forced to withdraw because he could no longer afford his defense.

Petitioner was then appointed the Public Defenders office whom admittedly was to be swamped with cases to collectively learn the facts of



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Petitioner's case which led to them impeaching his version of events at trial, ultimately ending up causing him to be convicted on all counts without challenge.

So, after all that, here Petitioner sits at a hearing on a Petition, that the court has successfully been avoiding having to address the merits of the issues contained within including the ineffectiveness of trial counsel that was appointed by the very same court, who now wants to appoint Petitioner yet another attorney who would most likely somehow prevent the merits from being addressed again.

Ofcourse Petitioner is going to decline. This court already told Petitioner in the forementioned civil right screening order (Case # 2:17-cv-02396-APG-PAL 2/7/19) that success on the claims contained within, (which are identical to the claims currently before Judge Leavitt.) would invalidate Petitioner's Judgment of Conviction. So, Petitioner requested that the petition be ruled on the merits. Judge Leavitt then denied the petition, not on the merits, but as follows

"Claims 1-3 are not appropriate for post conviction petition, they are more appropriate for direct appeal, and ground 4 is denied as he cannot carry his burden."

As forementioned, the pretrial custody claims could not have been raised on direct appeal because the arrest was not part of the trial record. As far as the ineffective assistance of counsel claims, Judge Leavitt never ruled that counsel was effective, or not ineffective, nor did she rule that Petitioner was not prejudiced. Therefore, there was no ruling on the merits of the petition.

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Petitioner filed a notice of appeal before a written order denying the petition was entered. Pursuant to Nevada Supreme Court precedence, the notice of appeal would take effect once the written order was entered.

#### IV Direct Appeal

Appellate counsel, Craig Mueller, filed the opening brief in Petitioner's Direct Appeal after the hearing on Habeas #1 (Opening brief filed July 9<sup>th</sup> 2019). In this brief, Mr. Mueller alleged that Petitioner was wrongfully denied NGR instructions (jury), ineffective assistance of counsel in relation to counsel's failure to present a defense, Due Process violations in denying trial counsel's the ability to argue NGR, and Judicial bias related to Judge Lexvitt's daughter and allegations Judge Tabiasson made in a media interview that Judge Lexvitt also commented on. Petitioner received a copy of the opening brief.

Upon reading the brief, Petitioner noticed that the version of events Mr. Mueller included in the appeal mirrored the incorrect version of events given at trial. He also recognized a name being associated with the Judicial bias claim. That name was Shane Valentine. Petitioner recognized the name as someone who was in the same unit as him during his illegal pretrial confinement. The briefing spoke of how Shane Valentine was an alleged pimp with whom Judge Lexvitt's daughter was residing with, along with two convicted prostitutes, who allegedly assaulted her on Shane Valentines command while he watched. The briefing included a link to an article. Petitioner had a copy of the article sent to him.

The article was from the Nevada Current, it was published



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June 6<sup>th</sup> 2018, and contained an interview with Judge Tobiasson (Petitioner's Justice Court Judge who presided over his preliminary hearing and put him on house arrest) in which the Judge alleged that Shane Valentine was operating a underage prostitution ring that included Judge Leavitt's daughter, Morgan Leavitt, out of a clothing store, which she alleged was a front for prostitution called Top Knotch Apparel. This immediately caught Petitioner's attention, because Petitioner was 100% owner of Top Knotch Apparel.

Not only did the article allege that Judge Leavitt's daughter was part of the prostitution ring, she alleged the ring was made up with the daughters of police officers and Judges. Judge Leavitt was fully aware of the allegations contained within the article as she commented on the article, and her comment was published along with the article. Judge Leavitt also knew Petitioner was the owner of the business that Judge Tobiasson alleged hosted the prostitution ring that her daughter was allegedly part of, as Petitioner's pre sentence investigation report (which Judge Leavitt was required to thoroughly review before sentencing Petitioner) specifically reborenced that he was the owner of Top Knotch Apparel.

At this point, regardless if the information contained within the article was true or not, any actions Judge Leavitt took in Petitioner's cases would be void due to the possibility of actual, and according to the standard of implied bias, as mandated by the United States Supreme Court.

#### Recusal #1

Judge Leavitt entered a minute order in Petitioner's Habeas case on

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July 19<sup>th</sup> 2019, recusing herself "to avoid the appearance of impropriety and implied bias". This was a proper recusal as she should not of been presiding over any case involving Petitioner, when her colleague is accusing him of being involved in a crime ring that includes her daughter.

A few weeks after her recusal, Judge Leavitt also had her brothers from their family law firm (Leavitt Law Firm) file a motion in Petitioner's Direct Appeal to strike all information regarding her daughter and Shane Valentine from the briefing. The Leavitt Law Firm simultaneously recommended Petitioner's Appellate Counsel for discipline and threatened defamation lawsuits. It is unclear who relayed to Judge Leavitt the information contained in the appeal in such an expeditious manner, however, the Nevada Supreme Court allowed Judge Leavitt to illegally intervene in Petitioner appeal (case # 79128).

Once Petitioner received and reviewed the information from the article, he immediately contacted Mr. Mueller to inform him that he was the owner of the store being spoken about in the article. Mr. Mueller had Petitioner's sister Tracy Brown fly out to Las Vegas from Georgia to meet with him at his office. At this meeting, it was relayed to Mr. Mueller that Petitioner wanted him to amend the briefing to correct the version of events, and reference to Dr. Boyd's testimony which included the correct version of events. Petitioner also wanted his illegal pretrial confinement, bail violations, as well as the constructive denial of counsel of choice allegations that were contained within the habeas petition, that Judge Leavitt said needed to be included in the direct appeal. Mr. Mueller then attempted to extort more money from Petitioner, by



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saying that he would not amend the briefing without being paid more money than originally agreed upon, in which had already been paid in full. Petitioner refused the extortion attempt, Mr. Mueller then filed a non opposition to Judge Leavitt's illegal motion, amended the brief removing the meritorious argument concerning Judge Leavitt's daughter and Shane Valentine without including any of the issues from Habeas petition #1 or correcting the version of events contained within, as Petitioner had requested. Mr. Mueller refused to even speak with Petitioner after the meeting and his failed attempt to extort him. Evidence of this conversation is included in Mr. Mueller's motion for extension for time to file a reply in the appeal.

Petitioner attempted to file a memorandum to the Nevada Supreme Court explaining that the version of events being told at trial, and in the Direct Appeal was not Petitioner's version of events, and that all the issues he wanted included were intentionally left out by Mr. Mueller.

This memorandum was returned to Petitioner unfiled because Petitioner had an attorney of record. However, the memorandum was stamped by the Nevada Supreme Court Clerk, and can be viewed on the Direct Appeal docket. This evidence shows Mr. Mueller's intentional ineffectiveness, as this information would have defeated the states argument on appeal.

### Recusal # 2

Shortly after Mr. Mueller amended the appeal briefing removing the information to support the bias argument, Judge Leavitt recused from Petitioner's criminal case # C-14-321675-1 on August 2<sup>nd</sup> 2019. Judge Leavitt then, while still recused, entered an order denying Habeas Petition #1 for procedural bars on August 7<sup>th</sup> 2019 (According to Nevada Supreme Court

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precedence this order is void.)

The following day, Judge Michael Villani (Presiding Chief Judge of the Criminal Division), without any explanation except it appears the recusal was filed in error, entered an order reassigning Judge Leavitt to Petitioners Habeas case.

### Judge Tobiasson's Media Interview

In September 2019, an article was published about Petitioners case with the Baltimore Post Examiner. It was titled "Why is Las Vegas Judge Michelle Leavitt still on the bench?" It contains excerpts from an interview with Judge Tobiasson. This time, Judge Tobiasson went into great detail about her belief that Petitioners business was a front for prostitution, how her own daughter worked for the business, and how Shane Valentine attempted to recruit her daughter to work as a prostitute while she was employed there. The article also contained court transcripts from a hearing that Judge Tobiasson presided over, in which Judge Leavitt's daughter testified under a different last name about the incident when she was assaulted by the two convicted prostitutes she was living with, under Shane Valentines command while he watched.

The most important information that came from the interview contained within this article is Judge Tobiasson's admission that she knew who Petitioner was, referred to him by name, knew he had a case in front of her, knew he owned Top Knotch, alleged he was a pimp, and claimed his business Top Knotch, was a front for prostitution. She also went into detail about how she would personally sit outside Top Knotch and conduct surveillance to feed information to LUMPD and ultimately the FBI in an attempt to get Petitioner arrested and shut down his business.

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### Attorney General's involvement in bail bond case

Petitioner received notice that an administrative proceeding was being initiated against the bondsman Michael Slyman and Easy Bail II, to be prosecuted by the Nevada Attorney General's office for the fraudulent actions in connection with Petitioner's bail bond transaction. As it turns out, the collateral Petitioner posted (his Aston Martin) to secure the \$350,000 bond, was illegally converted and sold by Mr. Slyman while Petitioner's complaint was being investigated, and before Judge Tagliatti had ordered the bond exonerated. It was also found that Mr. Slyman violated several procedural statutes during his involvement with Petitioner's illegal arrest.

A hearing was held on November 1<sup>st</sup> 2019, in which Mr. Slyman was able to present witnesses in his defense, and cross examine the State's witnesses against him. Petitioner, as well as a co-signer on Petitioner's bond was called to testify at this hearing. On December 16<sup>th</sup> 2019, The Commissioner of Insurance whom presided over this hearing entered a detailed Findings of Fact, conclusions of law and order. The most important information contained in this order was the fact Mr. Slyman caused the illegal arrest of Petitioner by LUMPA without cause. For his part in this Fraud, he was fined and lost his, as well as his bonding companies license to conduct bail transactions in the State of Nevada.

As of the date of the Commissioner's order, this was the only hearing close to Due Process Petitioner received concerning his illegal pretrial confinement. Mr. Slyman sought Judicial Review of the Commissioner's findings and was denied. Her findings were affirmed in its entirety by the Clark County District Court, including the fact Petitioner was illegally



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arrested. An order reflecting such was entered in case # A-28-808499-J Flynn v Division of Insurance, and # A-28-808509-J Flynn v Business of Industry.

V

### Habeas Corpus #2

Once the Commissioner's final order was entered affirming the fact Petitioner was arrested by LUMPD without cause, and while the appeal from Petition #1 was pending in front of the Court of Appeals along with Petitioner's Direct Appeal which was pending in the Supreme Court, Petitioner took the order as well as the information from Judge Tobiasson's media interview that supported claims of Judicial bias involving Judge Tobiasson and Judge Leavitt, and filed Habeas petition #2 on January 31<sup>st</sup> 2020.

In this petition, ground one contained allegations of Due Process violations in connection with the illegal pretrial confinement of Petitioner.

Grounds two and three were Judicial bias claims involving Judge Leavitt and Tobiasson. Petitioner also filed a motion to disqualify Judge Leavitt and reverse all her rulings. A motion was also filed in the appeal of Habeas #1 that was still pending. Chief Judge Linda Bell denied the motion before the District Court without addressing the allegations, the motion before the Court of Appeals remained pending.

### Affirmance of Petition #1's denial

While petition #2 was pending, The Nevada Court of Appeals affirmed the denial of petition #1 for procedural bars. The court ruled grounds 1-3 (grounds related to the two illegal seizures by LUMPD, Due Process violations that followed the seizures, excessive bail / No bail holds), as well as ground 4(a) (Constructive denial of counsel of choice), were appropriate for Direct

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Appeal, the court said Petitioner did not attempt to show cause or prejudice for not raising them on Direct Appeal.

As far as the ineffective assistance of counsel claims, the court found there was not enough specific facts alleged to show entitlement to relief. The Court did not address the merits of any of the claims. The Court also did not address the motion presenting the evidence of Judge Leavitt and Tobiassons bias, in fact the Chief Judge ordered the exhibits that included the articles to be detached and returned unfiled to Petitioner.

After the order of affirmance was entered, but before the remittitur issued, the hearing on petition #2 came up on June 2<sup>nd</sup> 2023. Petitioner was not present for the hearing. However, Judge Leavitt, despite having a clear conflict of interest, denied the petition as procedurally barred.

Once Petitioner found out Judge Leavitt failed to recuse herself he filed yet another motion to disqualify her on June 24<sup>th</sup> 2023. Judge Leavitt filed her flcl and order denying Petition #2 the following day June 25<sup>th</sup> 2023.

Ground #1 was denied as Judge Leavitt said she did not have jurisdiction to hear the claim as it was currently on appeal before the court of appeals (Petitioner's October 3<sup>rd</sup> 2016 illegal seizure and following imprisonment).

And Grounds 2 and 3, were denied under the successive bar of NR3 34.81(2) (Claims of Judicial bias of Judge Tobiasson as well as Judge Leavitt herself). None of the issues from this petition was addressed by Judge Leavitt. Petitioner filed a motion to reconsider as the remittitur from petition #1's appeal was about to issue, and grounds 2 and 3 were wrongfully denied as successive. A court date was set for the motion, the motion to reconsider was now pending.

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### Direct Appeal Order of Affirmance

On June 24<sup>th</sup> 2020, the Nevada Supreme Court entered an order of affirmance in Petitioners Direct Appeal. The Judicial bias claims in regards to Judge Tobiasson's statements to the media, and Judge Leavitt's daughter, were not addressed because of the earlier striking of the information (paving the way for IAC claim).

The Supreme Court also did not address the IAC claim regarding trial counsels failure to present a defense. The court ruled the claim needed to be raised in post conviction proceedings, (Petitioner feels the trial record supported the claim making an evidentiary hearing unnecessary) therefore, making this claim unavailable until the remittitur issued. As for the claim that Judge Leavitt erred by not instructing the Jury on NRS21, the Supreme Court ruled that even if Petitioner was delusional, evidence did not show that he believed hidden people or the victim posed an imminent danger that would justify his actions. The court also ruled that Petitioners expert witness, Dr. Boyd, testified that Petitioner did not consider the victim a threat, and this showed he had an appreciation for wrongfulness. This order as stated completely ignores the testimony of Petitioners expert witness, Dr. Boyd, who clearly testified that Petitioner did not intend to cause any harm to the victim, and was attempting to eliminate the threat that was trying to kill him.

The Supreme Court also commented on Dr. Boyd's statements after she viewed a video of Petitioner and the victim the day of the incident, however this video is not relevant to majority of the charges against Petitioner, as he was not armed at anytime in the video, and all but one of petitioners charges involve a weapon. The Supreme Court took Dr. Boyd's testimony



(22)

chopped it up, then pieced it back together to create an order that would conform to their decision to affirm the conviction. Trial counsel and appellate counsel's incorrect version of events also led this incorrect result, however, complete trial transcripts was part of the appeal, which contained the relevant evidence making this plain error. The remittitur from the appeal of habeas #1 as well as Direct Appeal issued July 28<sup>th</sup> 2020.

VI

### Amended Petition #2 and Petition #3

In the motion to reconsider the denial of Petition #2, Petitioner asked Judge Leavitt to consider an Amended petition. The same day the remittitur was filed in the appeal from Habeas #1 and the Direct Appeal, Petitioner filed the Amended Petition. The Amended petition reargued the grounds from Habeas #1 to fix the deficiencies that were pointed out by the Nevada Court of Appeals, as well as added some new grounds not available until the date it was filed such as ineffective assistance of Appellate counsel claims.

Shortly after the Amended petition was filed, Chief Judge Bell denied Petitioner's second motion to disqualify Judge Leavitt. Her order denying the second motion was filed July 24<sup>th</sup> 2020. Petitioner filed a motion for release / bail pending resolution of the pending Habeas petition on August 7<sup>th</sup> 2020. An ex parte motion, asking to be reimbursed for the premium paid on the \$350,000 bond Judge Togliatti exonerated without cause. Petitioner then retained new counsel, Michael McAvoy Amago. Mr. McAvoy Amago made an appearance in Petitioner's Habeas Case on August 24<sup>th</sup> 2020. The State filed an opposition to the motion to reconsider on August 26<sup>th</sup> 2020. Judge Leavitt's clerks contacted

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Mr. McAvoy Amara to ask him if he would like to supplement the motion to reconsider for the upcoming hearing. Counsel informed the Judges clerks that he would be addressing the procedural base in a Supplement Petition and will argue why the petition was not successive at the hearing. Counsel filed a Supplemental petition on September 25<sup>th</sup> 2020 (Habeas #3), as well as another motion to disqualify Judge Leavitt (3<sup>rd</sup> motion to disqualify). A few days later on September 30<sup>th</sup> 2020, Counsel filed a motion seeking clarification on Judge Villani's order reassigning recused Judge Leavitt, back to Petitioners habeas case.

On November 3<sup>rd</sup> 2020, Chief Judge Bell denied Petitioners 3<sup>rd</sup> motion to disqualify Judge Leavitt without addressing the merits or new evidence counsel discovered and included in the motion. Once denied, Counsel filed an emergency writ of Mandamus with the Nevada Supreme Court, seeking an order to enforce Judge Leavitt's recusal and vacate any and all orders that was entered after the recusal as void.

The Supreme Court declined to exercise extraordinary relief, ruling that a plain, speedy, remedy existed in appeal from denial of the petition (See *Brown v Eighth Judicial District Court* 475 P.3d 778 2020 nev unpub Lexis 1899). This order was entered November 16<sup>th</sup> 2020.

On March 9<sup>th</sup> 2021 after many continuances on the pending motions and petitions, Chief Judge Bell entered a minute order in Petitioners habeas case stating that Judge Leavitt may be a potential witness in this case as allegations are being made against her, and reassigned the case outside of the Eighth Judicial District to "Avoid the appearance of impropriety under the Revised Nevada Code of Judicial conduct 2.11(A)."



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"per the Chief Justice of the Nevada Supreme Court." This order was entered without explanation or documented record on when this conversation leading up to this decision occurred, or why it occurred. Counsel was left completely out the loop. The case was then transferred to Senior Judge Steven Kosach on March 17<sup>th</sup> 2021.

Judge Kosach asked for additional briefing from the State and Counsel on the bias issue, then held a hearing on May 19<sup>th</sup> 2021. At the conclusion of the hearing Judge Kosach denied the petition ruling it successive pursuant to NRS 34.810(2) without addressing any merits. He then took all pending motion off calendar, including the motion to reconsider to denial of petition #2 as successive.

## VII Nevada Supreme Court Appeal # 83314

Counsel appealed the denial of the forementioned petitions. The main issues in the appeal was whether the orders on the first two petitions were void because they were entered after Judge Leavitts July 19<sup>th</sup> recusal which would invalidate any possibility of petition #3 being successive. The second issue was whether a Judge is allowed to re-enter the proceedings after recusal as Judge Leavitts did. Counsel provided extensive case law supporting Petitioner's position that they can not. The third issue was even if the first and second petitions orders were valid, has there been a ruling on the merits of any petition that would allow NRS 34.810(2) to apply to the issues under appeal. And lastly, even if all orders were valid and correct, which they were not, was denial proper for the grounds raised that were not available when petition #1 and petition #2 were ruled on, these grounds included ineffective assistance of appellate

(25)

counsel claims.

A panel of the Nevada Supreme Court affirmed the denial of Habeas petition #3, however, they did not affirm on the same grounds as Judge Kasack, instead they ruled as follows

"Assuming without deciding that the denial of Brown's first petition was void because Judge Leavitt entered the order while in recused status, Brown nevertheless fails to demonstrate good cause and prejudice to overcome the procedural bars that apply to his third habeas petition. Specifically, Judge Leavitt ruled on Brown's second habeas petition once she re-entered the proceedings and that order is therefore valid. Brown failed to appeal from the denial of his second habeas petition and has therefore waived his ability to bring those claims in his third petition. See NRS 34.810(2)).

The court then went on to say that the new claims in the petition are not time barred, but barred as abuse of the writ under NRS 34.810(2).

VIII

### Procedural Bars

The Nevada Supreme Court has "assumed without deciding" for the first time in its history that an order is void, the Court has also disagreed with counsel's argument that, if the order denying petition #1 is void, then the orders from petition #2 & #3 is void also as they were based on the validity of petition #1's order. This ruling is in error. If petition #1's order is void, like it is, then it must be



(26)

Vacated. Once the void order is vacated, the orders from petition #1 and petition #2 must be vacated also under NRCP 60b(5), which reflects FRCP 60b(5). These rules provide for relief from a final judgment or order when it based on a previous order that has been vacated. Petitioner's position is, this is exactly why the Nevada Supreme Court has "assumed without deciding" an order is void for the very first time in its history to avoid having to address the merits of these troubling claims. The court's choice to ignore its precedence is a clear pass on curing these violations.

Also, even assuming the orders were not void, there has been no rulings on the merits of any petitions in the Nevada Supreme Court, or the lower District Court, that would count as Res judicata or law of the case, that would prevent Petitioner from re-raising the grounds in the third petition because petitioner failed to appeal the denial of petition #2 as the Nevada Supreme Court claims. Further, Petitioner did not appeal the denial of petition #2 for (1) because the first ground was denied as it was already under appeal before the state high court, and (2) because Petitioner filed a meritorious motion to reconsider, that was calendared for hearing, challenging the ruling that grounds 2 and 3 were barred by the successive bar of NRS 34.818(2).

This motion was continued several times up until the May 19<sup>th</sup> 2021, hearing in front of Judge Kosach, who took the motion off calendar that would have invalidated the order from petition #2's denial.

So, technically, a motion to reconsider is still pending that would need to be resolved concerning whether petition #2's denial of the claims as successive is valid, if the order denying petition



(27)

#1 is assumed to be void. Nevada Supreme Court precedence clearly holds "NRS 34.818(2) applies... only where the earlier petition was dismissed on the merits," not when "appellants petition for post conviction relief was dismissed on procedural grounds."

See *Bastwright v Angeline*, 109 Nev. 318, 322, 1993 Nev. Lexis 44, \*5.

Petition #1 was clearly dismissed on procedural grounds.

In taking petition #1's order to be valid, or void, Judge Leavitts ruling that the grounds are barred by the successive bar of NRS 34.818(2) is clearly erroneous, and Judge Kosack's decision to take the meritorious motion to reconsider Judge Leavitts denial as such, has erroneously prevented challenge to the order. The issue of the order being erroneous was raised before the Nevada Supreme Court, the Court has chosen to ignore these obvious facts, and has therefore passed upon the issue.

As far as the Nevada Supreme Courts ruling that Petitioner raises "disconcerting allegations", allegations which Petitioner failed to raise on "Direct Appeal or on appeal from the denial of his second habeas petition" this ruling is in error also. For (1) All grounds were either raised on Direct Appeal (Such as IAC claim and Judicial bias), or raised as ineffective assistance of appellate counsel (Such as Judicial bias, police misconduct ect), and (2) there was no denial or appeal of the denial of petition #2. The waiver bar of NRS 34.818(1)(b), applies only where there was an appeal, and an issue was omitted from the appeal. Not when a Petitioner fails to appeal a denial for procedural reasons. As long as a petition is timely, a Petitioner is allowed to file successive claims not ruled on the merits, and overcome procedural bars.

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

### GROUND 1

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my 14<sup>th</sup>, 14<sup>th</sup>, 6<sup>th</sup> Amendment right to Due Process, illegal seizure, trial & Appellate Counsel based on these facts: Counsel of choice.

(A) On April 1<sup>st</sup> 2016, while at liberty on \$60,000<sup>00</sup> bond with House Arrest as a Condition, an order was signed by Clark County District Court Judge Tagliatti removing Petitioner from the house arrest program from the dates of April 1<sup>st</sup> - 3<sup>rd</sup> 2016, to travel to California to meet with an expert witness. At this point per house arrest Sgt 18350 Petitioner was no longer part of the program as you can not travel outside of Clark County while on house arrest. When Petitioner showed up to house arrest officers to have his tracking device removed, the officers informed him that he would have to come back on Monday to get the device removed as it was the end of the day Friday, and they were about to close for the weekend. Petitioner then let the officers know his appointment was for the following afternoon (Saturday), so therefore Monday would be too late. The officers responded by saying that Petitioner should have shown up earlier, then started accusing him of being under the influence of alcohol. The officers had Petitioner take two breathalyzer test as well as a urinalysis, but refused to show him the results when he requested to see them. Petitioner was then remanded into custody under the order of house arrest supervisor Sgt. Tramba. Petitioner has never been formally notified as to why he was remanded.

This seizure was illegal in violation of the 4<sup>th</sup> Amendment. First, as per house arrest Sgt, Petitioner was no longer part of the house arrest program once the order was signed permitting him to travel, making it impossible to violate any rules. Second, Petitioner was not under the influence of alcohol, and the State never

Exhaustion of state court remedies regarding Ground 1:



Ground: *proved otherwise.*

*This loss of liberty was in violation of the 14<sup>th</sup> Amendment Due Process Clause as Petitioner never received notice of an alleged violation, nor a preliminary or final revocation hearing as Due Process requires. Neither LUMED or anyone from house arrest ever stepped foot in a court room to allege or prove a violation, however Petitioner was still held in custody.*

Supporting Facts:

*Trial counsel was ineffective for failing to take the correct legal action to cure these violations. Once denied Petitioner release, counsel had a duty to petition for habeas corpus pursuant to NRS 34.360. Had counsel done this, it would have been found that Petitioner was illegally seized and held without Due Process, he would have then been ordered released immediately.*

*The prejudice that resulted was Petitioner was falsely and maliciously imprisoned, his bail was excessively raised from \$60,000 to \$350,000 affecting his income as he was not able to operate his business during the time he was illegally imprisoned. He also was not able to travel to meet with his expert (and most important) witness Dr. Boyd, which greatly affected the time they had together to prepare his defense.*

*Even more important, these violations was early signs of police misconduct, which later became much more blatant. Petitioner posted the \$350,000 bond through Easy Bail Inc and was released June 3<sup>rd</sup> 2016, on house arrest.*

*(B) On October 3<sup>rd</sup> 2016, while at liberty on \$350,000 bail with house arrest, Sgt. Tromba and several other LUMED officers showed up to Petitioner's residence and informed him that he was being remanded into custody. The reason given, was Petitioner's bail had been revoked. This was not true. Petitioner was then illegally remanded into custody without probable cause or warrant. Following this illegal arrest, Sgt. Tromba*



Ground: had Petitioner's bondsman, Michael Shyman, come into house arrest offices the following day October 4<sup>th</sup> 2016, and conspired with him to cover up the illegal arrest. Sgt. Tromba had Mr. Shyman fill out an early Surrender (Temporary Custody Record) form to make it appear that he had personally made the surrender. On this form, Mr. Shyman made it look as if the surrender was due to Petitioner being arrested for another

Supporting Facts:

crime while out on bail. The effect of this fraud is, it prevented any hearing from being scheduled where UMPD or Mr. Shyman would have to show cause for Petitioner's arrest and imprisonment. As a result, Petitioner remained in custody without formal notice, a hearing or finding of probable cause for the arrest, up until and throughout his trial. This illegal custody lasted until he was transferred to Nevada Department of Corrections. A total of 809 days.

Petitioner's October 3<sup>rd</sup> 2016, arrest by UMPD was an illegal seizure in violation of the 4<sup>th</sup> Amendment. The continued illegal custody without formal notice, probable cause, as well as the fraud that prevented Petitioner from having the required Due Process hearings involved with this loss of liberty, is Police Misconduct in violation of the 14<sup>th</sup> Amendment Due Process Clause.

Trial Counsel's failure to take the appropriate legal action to cure these Constitutional violations as they were happening is ineffective assistance of counsel in violation of the 6<sup>th</sup> Amendment. Once denied Petitioner's release, Counsel had a duty to petition for habeas Corpus pursuant to NRS 34.36 &. Had counsel done this, it would have been found that Petitioner was intentionally illegally arrested then denied Due Process, at which time he would have been ordered released. He would have then been able to continue running his business and paying for his defense and



Ground: Counsel of choice.

The Prejudice that resulted due to counsel's deficient performance is, Petitioner was illegally imprisoned for 839 days, including throughout his trial and sentencing. During this time his business failed as a direct result of his illegal imprisonment, making it impossible for him to continue paying for his defense, which caused his paid counsel of choice to motion

Supporting Facts:

to withdraw. This is a State created conflict that amounts to structural error.

The week Petitioner's trial was to commence in August 2017, trial Counsel Gary Modafferi, filed a motion to withdraw. At the hearing he informed the court that Petitioner had been illegally arrested by LUMPD house arrest officers, and was now unable to continue paying for his defense as a result. Instead of correcting these violations or further investigating them, or at the very least appointing Counsel (Mr. Modafferi) whom was already on the case to avoid delaying trial, the court granted the request to withdraw over Petitioner's objection, vacated the approaching trial date, then appointed the Public Defenders office to represent Petitioner and reset trial to begin a few months after the appointment, even though the case had been pending for going on four years and Mr. Modafferi was familiar with the facts of the case and ready for trial. This was a key factor in the ineffectiveness of counsel at trial, Counsel did not have time to truly learn the facts of the case.

Appellate Counsel was also ineffective. Although the true circumstances of this illegal arrest was not part of the trial record because of the fraudulent actions of LUMPD and Michael Shyman, the true circumstances was discovered once an investigation was conducted by the Nevada Division of Insurance, resulting from a complaint Petitioner



1 **Ground:** filed against Mr. Shyman and his bonding company Easy Bail Inc. At  
 2 the conclusion of this investigation, an administrative proceeding was  
 3 prosecuted by the Nevada Attorney General's office against Mr. Shyman and  
 4 Easy Bail Inc on behalf of Petitioner. This administrative proceeding was  
 5 cause # 17.8821, and was held on November 1<sup>st</sup> 2019. The result of this  
 6 hearing was, it was found that Mr. Shyman caused Petitioner's illegal

7 **Supporting Facts:**

8 arrest without good cause. For his part in this fraud, his license as  
 9 a bondeman, as well as his bonding company, Easy Bail Inc, were  
 10 revoked. The Nevada Commissioner of Insurance presided over this  
 11 hearing and entered a detailed findings of fact, Conclusions of law and  
 12 order with her findings on December 16<sup>th</sup> 2019. Mr. Shyman petitioned  
 13 for judicial review of the Commissioner's order and was denied. The  
 14 reviewing Clark County District Court Judge affirmed the Commissioner's  
 15 findings in full, including the fact Petitioner was illegally arrested without  
 16 cause. The Court entered an order reflecting such in case #A-20-808499-J  
 17 (Shyman v Division of Insurance) and #A-20-808509-J (Shyman v Business  
 18 of Industry). This order was filed after the opening brief in Petitioner's  
 19 Direct Appeal was filed in July of 2019. Petitioner asked Appellate  
 20 Counsel Craig Mueller to amend the brief to include this ground. Mr.  
 21 Mueller refused to amend the brief without being paid more funds in direct  
 22 contradiction to representations his firm made at an earlier hearing in case  
 23 #A-19-798863-W, in June of 2019.

24 Mr. Mueller's firm made representations that all grounds from Petitioner's  
 25 that were appropriate for direct appeal would be included in the brief.  
 26 Had counsel included this ground in Direct Appeal the conviction would have  
 27 been reversed as the States intentional interference in Petitioner's ability to  
 28 defend himself is constructive denial of counsel of choice (Structural error).

► **Direct Appeal:**

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

\_\_\_ Yes ☒ No. If no, explain why not: The evidence to support the claims were not part of the trial record, and did not become available until after Direct Appeal.

► **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

☒ Yes \_\_\_ No. If no, explain why not: \_\_\_\_\_

If yes, name of court: 8<sup>th</sup> Judicial District Court date petition filed 2 / 25 / 19

Did you receive an evidentiary hearing? \_\_\_ Yes ☒ No. Did you appeal to the Nevada Supreme Court? ☒ Yes \_\_\_ No. If no, explain why not: \_\_\_\_\_

If yes, did you raise this issue? ☒ Yes \_\_\_ No. If no, explain why not: \_\_\_\_\_

► **Second Post Conviction:**

Did you raise this issue in a second petition for post conviction relief or state petition for habeas corpus?

☒ Yes \_\_\_ No. If yes, explain why: New evidence, and to overcome procedural bars.

If yes, name of court: 8<sup>th</sup> Judicial District Court date petition filed 1 / 31 / 20

Did you receive an evidentiary hearing? \_\_\_ Yes ☒ No. Did you appeal to the Nevada Supreme Court? \_\_\_ Yes ☒ No. If no, explain why not: The issue was still under appeal in Petition #1 when Petition #2 was ruled on. Court did not have jurisdiction to hear.

If yes, did you raise this issue? \_\_\_ Yes \_\_\_ No. If no, explain why not: N/A

► **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or

sentence overturned based on this issue (such as administrative remedies)? ☒ Yes \_\_\_ No. If yes,

explain: An administrative proceeding was held in front of the Commissioner of Insurance who confirmed in a detailed PPL that Petitioner was illegally imprisoned.

State concisely every ground for which you claim that the state court conviction and/or sentence is



unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

## GROUND 2

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my

Sixth

Amendment right to effective assistance of counsel trial & Appellate

based on these facts:

Petitioner's trial, and Direct Appeal Counsel were ineffective in the handling of  
Petitioner's trial and Direct Appeal.

(A) Petitioner's trial counsel was ineffective when they failed to advise Petitioner's  
expert witness, Dr. Boyd, on the M'Naghten / Nevada standard for insanity. Had  
counsel properly advised Dr. Boyd on this standard, when asked whether she knew  
the standard or whether Petitioner met it, Dr. Boyd would have been able to answer  
in the affirmative, and explained Petitioner was NGRI because he was under a  
delusion that a threat was actively trying to kill him, so he shot in an attempt to  
defend himself by eliminating that threat. Petitioner was prejudiced by counsel's  
deficient performance as Dr. Boyd, when asked by the State, could not give  
the definition of insanity as defined by Nevada Standard, nor could she  
answer by affirmation or denial whether Petitioner met the standard. This  
caused her testimony that Petitioner was delusional and believed someone in  
the house was trying to kill him, so he shot in defense, and did not intention-  
ally harm the victim, to be overshadowed. The prejudice that resulted was,  
Petitioner was wrongfully denied NGRI instructions at the conclusion of  
evidence resulting in a guilty verdict on all counts.

Appellate Counsel was also ineffective for failing to argue this on direct  
appeal. The Supreme Court noted this in its order of affirmance. Had counsel  
argued this Petitioner's conviction would have been overturned. The trial  
record supports this claim making an evidentiary hearing unnecessary.

Exhaustion of state court remedies regarding Ground 2:

► Direct Appeal:



1 **Ground:** (B)(1) Trial Counsel was ineffective for failing to secure a  
 2 ruling on NGR1 instructions before trial.

3 When hearing came before Judge Leavitt before trial on a motion  
 4 for a pretrial ruling on NGR1 instructions, Judge Leavitt told counsel  
 5 the instructions would be given, however, instead of ensuring an official  
 6 ruling was given, Counsel agreed to postpone the ruling and never

7 **Supporting Facts:**

8 ended up getting an official ruling. Counsel then proceeded to allow the  
 9 State to present their case unchallenged; under the belief they would be  
 10 able to argue NGR1 at the close of all evidence. At the close of all evidence,  
 11 Judge Leavitt denied the instructions and refused to allow counsel to argue  
 12 Petitioner was NGR1, leaving Petitioner without a defense to challenge the  
 13 States uncontested version of events at the conclusion of trial. This led to  
 14 Petitioner's conviction on all counts.

15 (2) Trial counsel was also ineffective for failing to correctly argue the fact  
 16 that evidence was presented by Dr. Boyd that warranted NGR1 instructions.  
 17 Specifically that Petitioner was under duress that a threat was actively trying  
 18 to kill him so he shot in an attempt to eliminate the threat, and at no time  
 19 did he intentionally harm the victim, as she was shot in the leg accidentally as  
 20 was he, as they both fell to the ground. This has been Petitioner's version of events  
 21 since day one.

22 (3) Instead of relaying this version of events, and impeaching the States version  
 23 of events as testified by the victim, when arguing for NGR1 instructions,  
 24 Counsel impeached Petitioner's version of events as told by Dr. Boyd by saying  
 25 the victim was intentionally shot, as Petitioner believed she was a fleeing  
 26 combatant that he was attempting to prevent from escaping. This version of  
 27 events have never been told by Petitioner. In failing to impeach the victim,  
 28 Counsel refused to show the police body cam footage to the jury which incl-

**Ground:** used a statement from the victim in which she said she was accidentally shot. This statement directly contradicts and impeaches her testimony at trial that she was intentionally shot, and would have corroborated Petitioner's version of events. Impeachment was important because the difference in the two versions of events, was the difference between NGR instructions being given or not. When counsel conceded the States

**Supporting Facts:**

evidence against Petitioner against his objection, this ensured his conviction on all counts.

Had Counsel secured a ruling and been denied NGR instructions Counsel could have presented evidence as forementioned to dispute the States case creating reasonable doubt which would have resulted in a not guilty verdict. Or, if Counsel would have secured a positive ruling, Counsel would have been able to argue the evidence presented proved Petitioner was NGR. (Specifically Dr. Boyd's testimony as forementioned).

(4) Appellate Counsel was also ineffective for failing to argue this version of events and argument on direct appeal as the trial record supports this claim making an evidentiary hearing unnecessary.

Both trial counsel Erika Ballou and Connor Slike have submitted affidavits testifying that they were ineffective, at Petitioner's trial.



Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

☒ Yes \_\_\_ No. If no, explain why not: \_\_\_\_\_

► **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

☒ Yes \_\_\_ No. If no, explain why not: \_\_\_\_\_

If yes, name of court: 8<sup>th</sup> Judicial District date petition filed 2 / 25 / 19

Did you receive an evidentiary hearing? \_\_\_ Yes ☒ No. Did you appeal to the Nevada Supreme Court? ☒ Yes \_\_\_ No. If no, explain why not: N/A

If yes, did you raise this issue? ☒ Yes \_\_\_ No. If no, explain why not: N/A

► **Second Post Conviction:**

Did you raise this issue in a second petition for post conviction relief or state petition for habeas corpus?

☒ Yes \_\_\_ No. If yes, explain why: ~~Ground~~ Ground was denied for procedural reasons, so Petitioner re-raised the issue with new evidence and overcame procedural basis.

If yes, name of court: 8<sup>th</sup> Judicial District date petition filed 7 / 22 / 20

Did you receive an evidentiary hearing? \_\_\_ Yes ☒ No. Did you appeal to the Nevada Supreme Court? ☒ Yes ☒ No. If no, explain why not: ~~Not raised~~ N/A

If yes, did you raise this issue? ☒ Yes \_\_\_ No. If no, explain why not: \_\_\_\_\_

► **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? \_\_\_ Yes ☒ No. If yes, explain: \_\_\_\_\_

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two



extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

### GROUND 3

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my

8<sup>th</sup> 14<sup>th</sup> Sixth

Amendment right to Excessive bail not required, Due Process, Effective assist  
Paid Counsel of choice. Counsel

based on these facts:

#### (A) Excessive Bail increases

(1) Petitioner bail was excessively raised from \$60,000 to \$350,000 without cause on May 18<sup>th</sup> 2016. The State filed identical motions twice before which were denied. During the hearing the State made record of two failure to appears that happened years earlier, however at the time of this hearing, Petitioner had already been at liberty on bail for 19 months, made all court appearances during this time, and had not picked up any new charges to warrant an increase as excessive. At of this hearing Petitioner was also being illegally imprisoned.

(2) Petitioner's bail was excessively raised to one million dollars December 8<sup>th</sup> 2017. At this hearing, Counsel requested bail be set at a reasonable amount or Petitioner be released on his own recognizance through motion, as Petitioner was being held with no bail. After acknowledging that Petitioner did have a constitutional right to bail, Judge Tagliatti set bail at one million Dollars, an excessive raise from the already excessive amount of \$350,000. This was maliciously raised without cause, because Petitioner brought to the courts attention he was being held without bail. Petitioner was also being illegally held during this hearing.

#### (B) No Bail Hold/Due Process violation

At a June 6<sup>th</sup> 2017 hearing to reconsider bail status, Petitioner brought to the courts attention that he was being illegally imprisoned, as his October 3<sup>rd</sup> 2016, arrest was by LUMPD and without cause, in which he had not received any Due Process involving the loss of liberty. He also brought to the courts

Exhaustion of state court remedies regarding Ground 3:

#### • Direct Appeal:

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

Ground: attention that he still had a valid \$350,000 bond outstanding. Judge Togliatti then ordered Petitioner held with No Bail, without any explanation as to why. She then ordered Petitioner's custody records from his surrender, and continued the hearing. On July 28<sup>th</sup> 2017, Judge Togliatti had received the surrender paperwork from CUMPD, she noticed the TCR from October 4<sup>th</sup> 2016, indicated a bond surrender. She then ordered

#### Supporting Facts:

Petitioner's \$350,000 bond exonerated without notice or cause in violation of Due Process.

#### (C) Ineffective assistance of Counsel

Trial Counsel was ineffective for failing to take the correct legal action to cure the fore mentioned violations as they were happening. Once (1) Petitioner's bail was excessively raised, (2) Petitioner was ordered held with no bail without cause, (3) Counsel was denied a reduction or the setting of reasonable bail, Counsel had a duty to petition for habeas corpus pursuant to MRS 34.360. Had counsel done this, it would have been found that Petitioner's bail was excessive, and/or he was being held with no bail without cause. The violations would have then been corrected.

#### (D) Constructive Denial of Paid Counsel of Choice

The prejudice that resulted from the fore mentioned intentional and malicious Constitutional violations, is constructive denial of Petitioner's sixth amendment right to paid counsel of choice. Because of the excessive bail increases and no bail holds, combined with the illegal pretrial confinement, Petitioner was unable to continue running his business, as he either unable to make the excessive one million dollar bail, or was being held without bail. He was then unable to continue to pay for his defense and paid counsel of choice as a direct result (Emphasis Added) of this State created conflict, which is structural error.

#### (E) Ineffective Assistance of Appellate Counsel



1 **Ground:** Appellate Counsel was ineffective for failing to raise the forementioned  
2 issues of excessive / no bail holds, and constructive denial of counsel of  
3 choice on direct appeal. Had Counsel raised these issues, Petitioners  
4 conviction would have been reversed as those violations amount to  
5 structural error.

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7 **Supporting Facts:**  
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☐ Yes ☒ No. If no, explain why not: ~~trial~~ Ineffective assistance of counsel trial and Appellate.

► **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

☒ Yes ☐ No. If no, explain why not: \_\_\_\_\_

If yes, name of court: 8<sup>th</sup> Judicial District date petition filed 2 / 25 / 19

Did you receive an evidentiary hearing? ☐ Yes ☒ No. Did you appeal to the Nevada Supreme Court? ☒ Yes ☐ No. If no, explain why not: N/A

If yes, did you raise this issue? ☒ Yes ☐ No. If no, explain why not: N/A

► **Second Post Conviction:**

Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas corpus?

☒ Yes ☐ No. If yes, explain why: Nevada Supreme Court denied as procedurally barred so Petitioner re-raised the issue overcoming procedural bars.

If yes, name of court: 8<sup>th</sup> Judicial District date petition filed 7 / 22 / 28

Did you receive an evidentiary hearing? ☐ Yes ☒ No. Did you appeal to the Nevada Supreme Court? ☒ Yes ☐ No. If no, explain why not: N/A

If yes, did you raise this issue? ☒ Yes ☐ No. If no, explain why not: N/A

► **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? ☐ Yes ☒ No. If yes, explain: \_\_\_\_\_

**WHEREFORE**, petitioner prays that the court will grant him such relief to which he is entitled in this federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 by a person in state custody.



State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

#### GROUND FOUR

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my 14th, 6th Amendment right to Effective appellate counsel, impartial Judge, based on these facts:

##### (A) Judicial Misconduct and Bias

##### (1) Judge Melanie Tabiasson

The Justice Court Judge that set Petitioner's bail, presided over his preliminary hearing, then placed him on house arrest after he was already at liberty on bail, spent over a year personally investigating Petitioner and his business, Top Knotch, and requesting that the CVMPD arrest him and close down his business, which they ultimately did in violation of his constitutional right to bail and due process.

Judge Tabiasson also went public accusing Petitioner of being a pimp, and being part of a prostitution ring that involved his trial Judge's daughter, while his case was still open and the trial Judge, Michelle Leavitt, was still presiding over his case. Judge Tabiasson also implied several times that Judge Leavitt knew of this connection between Petitioner and Shere Valentine, whom she alleged was Judge Leavitt's daughter's pimp, and intentionally took action to seek revenge for an incident where Judge Leavitt's daughter was abused by two convicted prostitutes with whom she lived, along with Valentine, at his direction while he watched the assault. Judge Tabiasson also used her own daughter, who was employed at Top Knotch to attempt to gather information. Judge Tabiasson had a clear bias against Petitioner and may have created or expanded a bias his trial Judge, Michelle Leavitt, had against Petitioner as well.

Exhaustion of state court remedies regarding Ground 1:

Ground: (2) Judge Michelle Leavitt

The trial Judge, Michelle Leavitt, had a known actual bias and prejudice toward Petitioner relating to allegations of her daughters involvement in a prostitution ring that Judge Tobiasson publicly linked to Petitioner's business, Top Knotch.

Judge Leavitt, displayed this bias during Petitioner's trial, by telling

**Supporting Facts:**

trial counsel during a hearing, on a pretrial motion, for a ruling on proposed jury instructions involving a NGBI defense. At this hearing, Judge Leavitt told trial counsel the instructions would be given, then at the close of evidence, did not allow counsel to argue that Petitioner was NGBI, and did not allow the jury the option to find Petitioner NGBI, after counsel anchored Petitioner's entire defense on being able to argue NGBI during closing arguments. Judge Leavitt completely closed her mind to evidence presented by Petitioner's expert witness, Dr. Boyd, that supported the defense, requiring the jury to be instructed accordingly.

When Petitioner raised the issue of Judge Tobiasson's allegations of Judge Leavitt's daughters involvement in the prostitution ring that was linked to Top Knotch, Judge Leavitt immediately recused herself from Petitioner's initial post-conviction habeas proceedings. Ten days later, with the aid of her family's law firm, Judge Leavitt intervened as a third party in Petitioner's direct appeal, threatened Petitioner's appellate counsel with bar discipline and a defamation lawsuit if he did not pull the argument relating to Judge Leavitt's daughter and Top Knotch.

Petitioner's Appellate Counsel, Craig Mueller, succumbed to that pressure and filed a non-opposition to Leavitt's Motion to Strike and Refer Mr. Mueller to bar discipline. One day later, Judge Leavitt recused herself



1 **Ground:** from Petitioner's criminal case for the appearance of bias.

2 Thereafter, Judge Casutt convinced Chief Judge Michael Villani to reverse  
3 her refusal in Petitioner's post conviction habeas matter telling Judge  
4 Villani it was filed in error. Before Judge Villani reassigned Judge Casutt  
5 back to Petitioner's case, Judge Casutt entered an order denying  
6 Petitioner's habeas #1 for procedural reasons while still recused.

7 **Supporting Facts:**

8 Judge Casutt has made serious misrepresentations of fact in  
9 regards to her daughters involvement with Shane Valentine and  
10 Judge Tabarons allegations in numerous filings in the case. Both  
11 the Justice Court Judge and District Court Judge harbored actual and  
12 implied bias that prejudiced Petitioner's trial, direct appeal, and habeas  
13 case. Judge Casutt also took a properly filed habeas Corpus Petition  
14 "off calendar" to prevent Petitioner from obtaining relief from a  
15 jury verdict prior to sentencing.

16 **(B) Ineffective Assistance of Appellate Counsel**

17 Petitioner's Appellate Counsel was ineffective when he succumbed  
18 to pressure from Judge Casutt's threats in her motion to strike Petitioner's  
19 meritorious arguments on appeal, had counsel motioned to strike  
20 the illegal motion filed by Casutt, and presented the evidence of  
21 actual and implied bias on Appeal, Petitioner's conviction would  
22 have been reversed as a partial Judicial officer is structural  
23 error, and in Petitioner's case there was at least two partial  
24 Judicial officers.

► **Direct Appeal:**

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

☒ Yes ☐ No. If no, explain why not: N/A

► **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

☐ Yes ☒ No. If no, explain why not: Issue was still before the Nevada Supreme Court on Direct Appeal.

If yes, name of court: N/A date petition filed N/A /    /   

Did you receive an evidentiary hearing? N/A Yes ☐ No. Did you appeal to the Nevada Supreme Court? ☐ Yes ☐ No. If no, explain why not: N/A

If yes, did you raise this issue? N/A Yes ☐ No. If no, explain why not:   

► **Second Post Conviction:**

Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas corpus?

☒ Yes ☐ No. If yes, explain why: New evidence was discovered

If yes, name of court: 8<sup>th</sup> Judicial District Court date petition filed 1 / 31 / 28

Did you receive an evidentiary hearing? ☐ Yes ☒ No. Did you appeal to the Nevada Supreme Court? ☐ Yes ☒ No. If no, explain why not: Issue was still before Nevada Supreme Court on Direct Appeal, Plus Judge Casutt erroneously denied as excessive, kept rehearing motion on calendar.

If yes, did you raise this issue? ☐ Yes ☐ No. If no, explain why not: N/A

► **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? ☐ Yes ☒ No. If yes, explain:   

State concisely every ground for which you claim that the state court conviction and/or sentence is



unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two extra pages stating additional grounds and/or supporting facts. You must raise in this petition all grounds for relief that relate to this conviction. Any grounds not raised in this petition will likely be barred from being litigated in a subsequent action.

### GROUND 5

I allege that my state court conviction and/or sentence are unconstitutional, in violation of my

14th

Amendment right to Due Process

based on these facts:

Prosecutorial and Police misconduct / Fraud upon the Court.

The LUMPD and the Clark County District Attorneys who prosecuted Petitioner's case engaged in egregious misconduct in violation of Petitioner's constitutional right to bail and due process causing the early surrender of Petitioner's bail without cause, committing fraud in the preparation of official custody documents to cover up their misconduct, which caused Petitioner to become financially insolvent causing Petitioner's case to shift between to many attorneys for trial and appellate counsel to have effectively defended his case, and present his appeal. The State also committed fraud upon the court misrepresenting facts regarding the surrender of Petitioner's bail.

Further, the LUMPD and Clark County District Attorney were well aware of Petitioner's ownership of Top Knatch, and the connections between Top Knatch and Judge Leavitt's daughter, and Judge Tobiassons personally motivated investigation into Petitioner and his business. Despite that knowledge, the State failed to notify Petitioner's trial counsel of the conflict and allowed Leavitt to proceed in Petitioner's case despite knowing of her bias. The State also failed to apprise the Nevada Supreme Court of Judge Leavitt's clear conflict of interest, failed to move to strike Leavitt's motion that argued from the position of the state and included misrepresentations of fact, and later participated in Petitioner's pro se habeas proceeding without demanding Leavitt recuse herself, denying Petitioner Due Process.

Ground Six

Cumulative error warrants reversal

Exhaustion of state court remedies regarding Ground 2:

Direct Appeal:

Did you raise this issue on direct appeal from the conviction to the Nevada Supreme Court?

☐ Yes ☒ No. If no, explain why not: Evidence was not part of trial record or Available when direct appeal was filed.

► **First Post Conviction:**

Did you raise this issue in a petition for post conviction relief or state petition for habeas corpus?

☒ Yes ☐ No. If no, explain why not: N/A

If yes, name of court: 8<sup>th</sup> Judicial District date petition filed 8 / 25 / 19

Did you receive an evidentiary hearing? ☐ Yes ☒ No. Did you appeal to the Nevada Supreme Court? ☒ Yes ☐ No. If no, explain why not: N/A

If yes, did you raise this issue? ☒ Yes ☐ No. If no, explain why not: N/A

► **Second Post Conviction:**

Did you raise this issue in a **second** petition for post conviction relief or state petition for habeas corpus?

☒ Yes ☐ No. If yes, explain why: \_\_\_\_\_

If yes, name of court: 8<sup>th</sup> Judicial District Court date petition filed 9 / 25 / 20

Did you receive an evidentiary hearing? ☐ Yes ☒ No. Did you appeal to the Nevada Supreme Court? ☒ Yes ☐ No. If no, explain why not: N/A

If yes, did you raise this issue? ☒ Yes ☐ No. If no, explain why not: N/A

► **Other Proceedings:**

Have you pursued any other procedure/process in an attempt to have your conviction and/or sentence overturned based on this issue (such as administrative remedies)? ☐ Yes ☒ No. If yes, explain: \_\_\_\_\_

State concisely every ground for which you claim that the state court conviction and/or sentence is unconstitutional. Summarize briefly the facts supporting each ground. You may attach up to two



N/A  
(Name of person who wrote this  
complaint if not Plaintiff)

[Signature]  
(Signature of Plaintiff)

4/18/23  
(Date)

N/A  
(Signature of attorney, if any)

\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
(Attorney's address & telephone number)

### DECLARATION UNDER PENALTY OF PERJURY

I understand that a false statement or answer to any question in this declaration will subject me to penalties of perjury. I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE UNITED STATES OF AMERICA THAT THE FOREGOING IS TRUE AND CORRECT.  
See 28 U.S.C. § 1746 and 18 U.S.C. § 1621.

Executed at Northern Nevada Correctional Center on 4/18/23  
(Location) (Date)

[Signature]  
(Signature)

1289358  
(Inmate prison number)

Exhibit A

Nevada Supreme Court  
Direct Appeal  
Order of Affirmance

Exhibit A




IN THE SUPREME COURT OF THE STATE OF NEVADA

MARLON BROWN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 77962

**FILED**

JUN 24 2020

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
CHIEF DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of second-degree kidnapping with a deadly weapon, assault with a deadly weapon, battery with a deadly weapon constituting domestic violence, battery by strangulation constituting domestic violence, two counts of battery with a deadly weapon causing substantial bodily harm, and six counts of discharging a firearm from or within a structure.<sup>1</sup> Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge. Appellant Marlon Brown pleaded not guilty by reason of insanity and raises two main issues related to the district court's decision not to instruct the jury on that defense.<sup>2</sup>

First, Brown contends that because he presented evidence that he was insane at the time of the offense, the district court abused its discretion by not giving an insanity defense instruction. Nevada law

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<sup>1</sup>Pursuant to NRAP 34(f)(1), we conclude that oral argument is not warranted.

<sup>2</sup>Claims of ineffective assistance of counsel should be raised in postconviction proceedings in the district court in the first instance and are generally not appropriate for review on direct appeal. *Feazell v. State*, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995). Appellant has not demonstrated that any issues of ineffective assistance of counsel are appropriate for review on direct appeal in the instant case. We therefore decline to address appellant's ineffective-assistance claims.

“permits a finding of legal insanity only if at the time of the killing, a delusional state: (1) rendered the defendant incapable of knowing or understanding the nature of his act, *i.e.*, that he was killing a human being, or (2) prevented the defendant from appreciating the wrongfulness of his act, *i.e.*, that the killing was not justified under the law.” *Blake v. State*, 121 Nev. 779, 801-02, 121 P.3d 567, 581 (2005) (Becker, C.J., concurring in part and dissenting in part); *see also* NRS 174.035(6) (providing the plea of not guilty by reason of insanity). The insanity defense is “very narrow,” and a defendant is entitled to jury instructions on it only if he presents evidence that he acted under a delusion and his “delusion, if true, would justify the commission of the criminal act.” *Finger v. State*, 117 Nev. 548, 577, 27 P.3d 66, 85 (2001) (clarifying the standard of legal insanity announced in *M’Naghten’s Case*, 8 Eng. Rep. 718, 10 Cl. & Fin. 200 (1843)).

Here, the victim testified that she and Brown were romantically involved. One night, Brown began acting aggressively. When the victim attempted to leave the apartment, Brown threw her down and choked her. Brown then retrieved a firearm and dragged the victim throughout the apartment looking for unknown individuals. Brown repeatedly demanded the victim tell him where the unknown individuals were hiding and ordered her to tell them to come out. Brown shot the victim once in each leg and threatened to kill her and himself. During this incident, before fleeing the scene, he fired several gunshots into a closet and shot out a window in the apartment.

In his case-in-chief, Brown presented evidence that he suffered from post-traumatic-stress disorder as a result of his military service. When settling jury instructions, Brown claimed he acted under the delusion that he was in combat. However, Brown’s expert testified that she did not know if Brown thought he was in combat; rather, he believed “bad people”



were in the residence, but not necessarily enemy soldiers. The expert stated that during the incident Brown knew who the victim was and did not consider her a threat. Further, the expert did not know the legal standard for insanity or whether Brown met it.<sup>3</sup> See *Finger*, 117 Nev. at 577, 27 P.3d at 85 (“[W]e stress the need for experts and juries to be correctly advised on the M’Naghten standard.”). Thereafter, the district court concluded that Brown had not presented evidence to support facts that, if true, would have justified him seizing, strangling, and shooting the victim or firing gunshots within the residence. See *id.* (“Unless a defendant presents evidence that complies with [the M’Naghten] standard, he or she is not entitled to have the jury instructed on the issue of insanity.”); NRS 174.035(6) (providing that “the burden of proof is upon the defendant to establish by a preponderance of the evidence” the insanity defense elements). The record supports the district court’s conclusion because the evidence did not show that Brown, even if delusional, believed the victim or hidden people posed an imminent danger that would justify his actions.<sup>4</sup> Cf. *Finger*, 117 Nev. at

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<sup>3</sup>After viewing a video that depicted part of the incident, the expert testified that Brown did not appear to be looking for anyone hidden in the apartment, and his actions showed aggression, impulse control problems, and poor judgment consistent with post-traumatic-stress disorder. This testimony only supported a diminished capacity defense, which is not recognized in Nevada. See *Crawford v. State*, 121 Nev. 744, 757, 121 P.3d 582, 591 (2005) (“[T]he technical defense of diminished capacity is not available in Nevada.”); see also *Diminished Capacity*, *Black’s Law Dictionary* (11th ed. 2019) (defining “diminished capacity” as “[a]n impaired mental condition—short of insanity—that is caused by intoxication, trauma, or disease and that prevents a person from having the mental state necessary to be held responsible for a crime”).

<sup>4</sup>Because the evidence did not support instructing the jury on the insanity defense, the district court did not err by precluding Brown from arguing that he was not guilty by reason of insanity. See *Lloyd v. State*, 94

576, 27 P.3d at 85 (“Persons suffering from a delusion that someone is shooting at them, so they shot back in self-defense are insane under *M’Naghten*.”). Moreover, the expert’s testimony that Brown did not consider the victim a threat showed he had an appreciation of wrongfulness. Therefore, we conclude the district court did not abuse its discretion.<sup>5</sup> See *id.* at 577, 27 P.3d at 85 (rejecting the proposition “that any evidence of mental illness or aberration requires the jury to be instructed on the issue of legal insanity”); see also *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001) (regarding jury instructions, “[a]n abuse of discretion occurs if the district court’s decision is arbitrary or capricious or if it exceeds the bounds of law or reason.”).

Second, Brown argues that the district court exhibited judicial bias when rejecting his proposed insanity defense. We disagree. Specifically, Brown takes issue with the district court’s skepticism about Brown’s argument that his conduct would be justified because it would be permitted while clearing a residence in combat. Judges are presumed to be unbiased and the party asserting bias has the burden to present sufficient

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Nev. 167, 169, 576 P.2d 740, 742 (1978) (“[I]t is improper for an attorney to argue legal theories to a jury when the jury has not been instructed on those theories.”). Brown was, however, able to argue that he lacked the mens rea to commit the crimes.


<sup>5</sup>We also conclude Brown’s argument that the district court’s refusal to instruct the jury on the insanity defense or allow him to argue the theory to the jury violated his federal due process rights lacks merit. As we noted, Brown argued that he lacked the required mens rea but did not meet his burden to prove legal insanity. See *Kahler v. Kansas*, 140 S. Ct. 1021, 1037 (2020) (providing that due process does not require a particular test for legal insanity; rather, determining the relationship between legal insanity and criminal culpability “is a project for state governance, not constitutional law”).

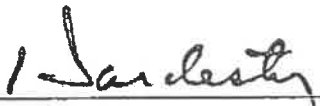



grounds to rebut that presumption. *Hogan v. Warden*, 112 Nev. 553, 559-60, 916 P.2d 805, 809 (1996).

Here, the district court had not closed its mind to the consideration of evidence. See *Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998) (“[The] remarks of a judge made in the context of a court proceeding are not considered indicative of improper bias or prejudice unless they show that the judge has closed his or her mind to the presentation of all the evidence.”). Rather, when Brown argued that the rules of engagement would justify his actions, the district court commented that no evidence established those rules. The district court’s skepticism that a soldier is permitted to shoot an unarmed individual may be seen as a comment on the lack of evidence presented by the defense on the rules of engagement. Thus, Brown has not shown any bias or partiality that would warrant relief where the district court merely discussed the trial evidence and whether any evidence supported Brown’s insanity defense. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

  
Parraguirre, J.

  
Hardesty, J.

  
Cadish, J.

cc: Hon. Michelle Leavitt, District Judge  
Craig Mueller & Associates  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

Exhibit B

Nevada Court of Appeals  
Order of Affirmance  
Habeas Corpus Petition #1

Exhibit B



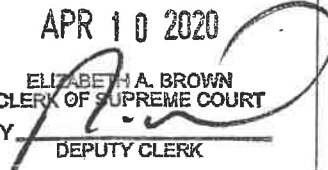
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARLON LORENZO BROWN,  
Appellant,  
vs.  
BRIAN WILLIAMS, WARDEN,  
Respondent.

No. 79128-COA

**FILED**

APR 10 2020

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY  DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Marlon Lorenzo Brown appeals from an order of the district court denying a postconviction petition for a writ of habeas corpus filed on February 25, 2019. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Brown contends the district court erred by denying his claim that trial counsel were ineffective. To demonstrate ineffective assistance of trial counsel, a petitioner must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that there was a reasonable probability of a different outcome absent counsel's errors. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697. A petitioner's claims must be supported by specific factual allegations that are not belied by the record and, if true, would entitle him to relief. *Cf. Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984).

To the extent Brown claimed his counsel were ineffective for not cross-examining the victim at trial regarding the differences between her

recorded statements to police and her testimony at trial, Brown failed to specify how the victim's versions of events differed or how it would have affected the outcome of the trial. And to the extent Brown claimed his counsel were ineffective for not cross-examining other witnesses, he failed to specify what questions counsel should have posed, what the responses would have been, or how they would have affected the outcome of the trial. Brown's bare claims did not demonstrate he was entitled to relief. Trial counsels' statements to the trial court that they would be ineffective if the court did not continue closing arguments did not amount to specific facts that would demonstrate Brown was entitled to relief. We therefore conclude the district court did not err by denying this claim.

Brown also claimed he was subjected to illegal post-arrest seizure that violated his 4th and 14th Amendment rights, he was subject to excessive bail in violation of his 8th Amendment rights, and the trial court denied him his right to counsel of his choice. Claims that could have been raised in a direct appeal must be dismissed absent a demonstration of cause for the failure to raise them on direct appeal and actual prejudice. NRS 34.810(1)(b)(2). Brown's claims were appropriate for direct appeal, and he did not attempt to demonstrate cause and prejudice.

For the first time in his reply to the State's response below, Brown contended that these claims were ineffective assistance of counsel claims. Brown's contention lacked merit. First, it is belied by the record. Brown clearly raised some claims of ineffective assistance of trial counsel, demonstrating he knew how to indicate that a claim was one of ineffective assistance. His remaining claims were devoid of any reference to ineffective assistance or even a claim of something counsel should or should not have done. Second, claims may not be raised for the first time in a reply, because

it deprives the State of the opportunity to respond. *See Barnhart v. State*, 122 Nev. 301, 303, 130 P.3d 650, 651 (2006) ("Generally, the only issues that should be considered by the district court . . . on a post-conviction habeas petition are those which have been pleaded in the petition or a supplemental petition and those to which the State has had an opportunity to respond.").

We therefore conclude the district court did not err by denying these claims as procedurally barred. Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>1</sup>

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Hon. Michelle Leavitt, District Judge  
Marlon Lorenzo Brown  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

<sup>1</sup>In light of our disposition, we deny Brown's pro se motions filed in this appeal.



Exhibit C

Clark County District Court  
ffcl and order (Petition #2)  
(Judge Leavitt)

Exhibit C

Electronically Filed  
06/25/2020 1:21 PM

*Heaven S. Smith*  
CLERK OF THE COURT

1 **FCL**  
2 **STEVEN B. WOLFSON**  
3 **Clark County District Attorney**  
4 **Nevada Bar #001565**  
5 **ALEXANDER G. CHEN**  
6 **Chief Deputy District Attorney**  
7 **Nevada Bar #10539**  
8 **200 Lewis Avenue**  
9 **Las Vegas, Nevada 89155-2212**  
10 **(702) 671-2500**  
11 **Attorney for Plaintiff**

DISTRICT COURT  
CLARK COUNTY, NEVADA

9 **THE STATE OF NEVADA,**  
10 **Plaintiff,**

11 **-vs-**

12 **MARLON LORENZO BROWN,**  
13 **aka Marlon Brown, #2633113**

14 **Defendant.**

**CASE NO: A-19-790063-W**

**DEPT NO: XII**

15 **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

16 **DATE OF HEARING: JUNE 2, 2020**  
17 **TIME OF HEARING: 12:00 PM**

18 This cause having come on for hearing before the Honorable Michelle Leavitt, District  
19 Judge, on June 2, 2020, the Petitioner pro se, not appearing, the Respondent being represented  
20 by Steven B. Wolfson, District Attorney, through Colleen Baharav, Esq., Chief Deputy  
21 District Attorney, and the Court having considered the matter, including briefs, transcripts,  
22 and documents on file herein, now therefore, the Court makes the following findings of fact  
23 and conclusions of law:

24 //

25 //

26 //

27 //

28 //

**STATEMENT OF THE CASE**

On October 22, 2014, MARLON LORENZO BROWN, aka Marlon Brown (hereinafter "Petitioner"), was charged by way of Information with: Count 1 – BATTERY WITH USE OF A DEADLY WEAPON CONSTITUTING DOMESTIC VIOLENCE (Category B Felony – NRS 200.481, 200.485, 33.018); Counts 2 & 3 – BATTERY WITH USE OF A DEADLY WEAPON CONSTITUTING DOMESTIC VIOLENCE RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony – NRS 200.481, 200.485, 33.018); Counts 4-7 – DISCHARGING FIREARM AT OR INTO OCCUPIED STRUCTURE, VEHICLE, AIRCRAFT, OR WATERCRAFT (Category B Felony – NRS 202.285); Counts 8-14 – DISCHARGE OF FIREARM FROM OR WITHIN A STRUCTURE OR VEHICLE (Category B Felony – NRS 202.287); Count 15 – BATTERY CONSTITUTING DOMESTIC VIOLENCE – STRANGULATION (Category C Felony – NRS 200.481, 200.485, 33.018); Count 16 – ASSAULT WITH A DEADLY WEAPON (Category B Felony – NRS 200.471); and SECOND DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.310, 200.330, 193.165).

On November 26, 2014, Petitioner filed a pre-trial Petition for Writ of Habeas Corpus. The State filed its Return on December 24, 2014. On January 15, 2015, Petitioner filed his Reply. On January 27, 2015, Petitioner's pre-trial Petition was denied.

On December 30, 2015, Petitioner filed a Motion to Continue Jury Trial. The State filed its Opposition on January 6, 2016. Petitioner filed his Reply that same day. On January 7, 2016, Petitioner's motion was granted.

On March 6, 2017, Petitioner filed an additional Motion to Continue Trial. On March 16, 2017, Petitioner's motion was granted.

On July 25, 2017, Petitioner filed a Notice of Intent to Rely on Plea of Not Guilty by Reason of Insanity Pursuant to NRS 174.035(5). On February 22, 2018, Petitioner filed a Motion for Pre-Trial Ruling on Proposed Jury Instructions Relating to Not Guilty by Reason of Insanity. The State filed its Opposition on March 5, 2018. On March 7, 2018, Petitioner was allowed to correct his plea.



Jury trial commenced on March 6, 2018. That same day, the State filed an Amended Information charging Petitioner with: Count 1 – BATTERY WITH USE OF A DEADLY WEAPON CONSTITUTING DOMESTIC VIOLENCE (Category B Felony – NRS 200.481, 200.485, 33.018); Counts 2 & 3 – BATTERY WITH USE OF A DEADLY WEAPON CONSTITUTING DOMESTIC VIOLENCE RESULTING IN SUBSTANTIAL BODILY HARM (Category B Felony – NRS 200.481, 200.485, 33.018); Counts 4-9 –DISCHARGE OF FIREARM FROM OR WITHIN A STRUCTURE OR VEHICLE (Category B Felony – NRS 202.287); Count 15 – BATTERY CONSTITUTING DOMESTIC VIOLENCE – STRANGULATION (Category C Felony – NRS 200.481, 200.485, 33.018); Count 16 – ASSAULT WITH A DEADLY WEAPON (Category B Felony – NRS 200.471); and SECOND DEGREE KIDNAPPING WITH USE OF A DEADLY WEAPON (Category B Felony – NRS 200.310, 200.330, 193.165).

On May 29, 2018, Petitioner filed a Motion to Dismiss Counsel and Proceed Pro Per and a Petition for Writ of Habeas Corpus. On June 14, 2018, this Court issued a Minute Order recognizing that Petitioner's Petition was a fugitive document and took the matter off calendar. On July 10, 2018, Petitioner withdrew his Motion to Dismiss Counsel.

On December 11, 2018, Petitioner was sentenced to the Nevada Department of Corrections as follows: as to Count 1 – thirty-two (32) to eighty-four (84) months; as to Count 2 – thirty-six (36) to one hundred twenty (120) months consecutive to Count 1; as to Count 3 – thirty-six (36) to one hundred twenty (120) months concurrent with Count 2; as to Count 4 – thirty-six (36) to one hundred twenty (120) months consecutive to Count 3; as to Count 5 – thirty-six (36) to one hundred twenty (120) months concurrent with Count 4; as to Count 6 – thirty-six (36) to one hundred twenty (120) months concurrent with Count 5; as to Count 7 – thirty-six (36) to one hundred twenty (120) months concurrent with Count 6; as to Count 8 – thirty-six (36) to one hundred twenty (120) months concurrent with Count 7; as to Count 9 – thirty-six (36) to one hundred twenty (120) months concurrent with Count 8; as to Count 10 – twelve (12) to thirty-six (36) months consecutive to Count 9; as to Count 11 – twelve (12) to forty-eight (48) months concurrent with Count 10; as to Count 12 – thirty-six (36) to one

1 hundred twenty (120) months plus a consecutive term of thirty-six (36) to ninety-six (96)  
2 months for use of a deadly weapon concurrent with Count 11 for a total aggregate sentence of  
3 one hundred sixteen (116) to three hundred sixty (360) months. The Judgement of Conviction  
4 was filed on December 17, 2018.

5 On December 27, 2018, Petitioner filed a Notice of Appeal. On February 27, 2019, this  
6 Court filed an Amended Judgment of Conviction. This appeal is still pending before the  
7 Nevada Supreme Court.

8 On February 25, 2019, Petitioner filed a Petition for Writ of Habeas Corpus (Post-  
9 Conviction). The State filed its Response on April 17, 2019. The Petitioner filed his Reply on  
10 May 16, 2019. On June 18, 2019, the Court denied Petitioner's Petition. The Court filed its  
11 Findings of Fact, Conclusions of Law and Order on August 7, 2019.

12 On June 24, 2019, Petitioner filed a Notice of Appeal. A decision is still pending before  
13 the Nevada Supreme Court.

14 On August 2, 2019, this Court issued a minute order stating that it would be recusing  
15 itself from Petitioner's case. On August 8, 2019, this Court issued a minute order stating that  
16 the recusal was issued in error.

17 On September 10, 2019, Petitioner filed a Motion to Disqualify Judge Michelle Leavitt  
18 and Vacate/Reverse All Her Judgments and Rulings Including Judgment of Conviction in Case  
19 C-14-301675-1. The Court issued an Affidavit in response to Petitioner's Motion of September  
20 25, 2019. On October 9, 2019, Petitioner filed a Supplement to his Motion. On October 15,  
21 2019, Chief Judge Linda Bell denied Petitioner's Motion. The Court issued its Decision and  
22 Order on October 23, 2019.

23 On January 31, 2020, Petitioner filed the instant second Petition for Writ of Habeas  
24 Corpus (Post-Conviction). The State filed its Response on April 27, 2020. On May 21, 2020,  
25 Petitioner filed his Reply. On June 2, 2020, this matter came on for argument and this Court  
26 rules as follows:

27 //

28 //

## STATEMENT OF THE FACTS

On August 30, 2014, the victim called 911 and reported she had been shot in the legs by Petitioner, her boyfriend of one year and he shot her he fled the scene still armed. A record check revealed Petitioner had two outstanding warrants for battery domestic violence and open container in a vehicle from Justice Court.

An officer in the area saw Petitioner with no shirt and blood covered pants, he was taken into custody. When asked if he understood his rights he answered, "I want to wait." Petitioner had a cut on his foot that was bleeding and minor scratches on his chest and back. There were strands of long dark hair stuck to his mouth, chin and neck area and dried blood on his chest. Petitioner was transported to the emergency room.

An officer who responded to UMC Trauma discovered the victim been shot on her left thigh and her right shin, which broke her leg. She required surgery to repair the leg. She also suffered significant trauma to the left side of her face and nose. She was in pain and visibly upset and reported that Petitioner had been drinking and using narcotics. They were both in her bedroom and he became paranoid and erratic. He believed people were in the apartment, specifically the guest bedroom. Petitioner got so paranoid; he armed himself with a semiautomatic handgun. He got up and pulled her out of bed by her hair and held her in front of himself as if he was using her as a shield to search the apartment. When they got to the bedroom, he opened fire into the closet and while shooting, he pulled her down on the bed. As they landed on the bed, she felt the pain of being shot. Sometime during the incident, he hit her on the head with the gun. Her injuries corroborated her claims.

Officers recovered a small semi-automatic firearm with blood in the crime area. There was a blood trail from the victim's apartment to where Petitioner was taken into custody.

Inside the apartment officers found a handgun holster in the master bedroom. They noted the large amount of blood in the living room and the hallway floor. There was a large amount of blood in the guest bedroom floor and the mattress. There were four bullet holes in the guest bedroom's closet door, one of the bullets had penetrated the wall and entered another apartment, and another bullet struck the plaster on the exterior of another apartment, but did



1 not penetrate the wall.

## 2 ANALYSIS

### 3 I. THIS COURT DOES NOT HAVE JURISDICTION TO HEAR 4 PETITIONER'S CLAIM 1, AS IT IS CURRENTLY BEFORE THE NEVADA 5 SUPREME COURT.

6 "Jurisdiction in an appeal is vested *solely* in the supreme court until the remittitur issues  
7 to the district court." Buffington v. State, 110 Nev. 124, 126, 868 P.2d 643, 644 (1994). While  
8 an appeal is pending district courts do not have jurisdiction over the case until remittitur has  
9 issued. Id.

10 Here, Petitioner claims that he was illegally incarcerated pending his trial date. Petition  
11 at 7. However, Petitioner made this claim in his first Petition for Writ of Habeas Corpus, which  
12 is currently on appeal before the Nevada Supreme Court. See Petition, filed February 25, 2019,  
13 p. 8-9. Therefore, this Court does not have jurisdiction over Petitioner's claim and the Petition  
14 is denied.

### 15 II. PETITIONER'S SECOND PETITION IS PROCEDURALLY BARRED.

#### 16 a. Petitioner's Petition is Successive and/or an Abuse of Writ.

17 NRS 34.810(2) reads:

18 A second or successive petition *must* be dismissed if the judge or  
19 justice determines that it fails to allege new or different grounds  
20 for relief and that the prior determination was on the merits or, if  
21 new and different grounds are alleged, the judge or justice finds  
that the failure of the petitioner to assert those grounds in a prior  
petition constituted an abuse of the writ.

22 (emphasis added). Second or successive petitions are petitions that either fail to allege new or  
23 different grounds for relief and the grounds have already been decided on the merits or that  
24 allege new or different grounds but a judge or justice finds that the petitioner's failure to assert  
25 those grounds in a prior petition would constitute an abuse of the writ. Second or successive  
26 petitions will only be decided on the merits if the petitioner can show good cause and  
27 prejudice. NRS 34.810(3); Lozada v. State, 110 Nev. 349, 358, 871 P.2d 944, 950 (1994).

28 //

1 The Nevada Supreme Court has stated: "Without such limitations on the availability of  
2 post-conviction remedies, prisoners could petition for relief in perpetuity and thus abuse post-  
3 conviction remedies. In addition, meritless, successive and untimely petitions clog the court  
4 system and undermine the finality of convictions." Lozada, 110 Nev. at 358, 871 P.2d at 950.  
5 The Nevada Supreme Court recognizes that "[u]nlike initial petitions which certainly require  
6 a careful review of the record, successive petitions may be dismissed based solely on the face  
7 of the petition." Ford v. Warden, 111 Nev. 872, 882, 901 P.2d 123, 129 (1995). In other words,  
8 if the claim or allegation was previously available with reasonable diligence, it is an abuse of  
9 the writ to wait to assert it in a later petition. McClesky v. Zant, 499 U.S. 467, 497-98 (1991).  
10 Application of NRS 34.810(2) is mandatory. See Riker, 121 Nev. at 231, 112 P.3d at 1074.

11 Petitioner filed his first Petition for Writ of Habeas Corpus on February 25, 2019. On  
12 June 18, 2019, the Court denied this Petition on the merits and issued a detailed Findings of  
13 Fact, Conclusions of Law and Order. Petitioner appealed and that appeal is still pending before  
14 the Nevada Supreme Court. Petitioner previously raised the same claim regarding alleged  
15 illegal incarceration. See Petition, filed February 25, 2019, p. 8-9. Petitioner's claims in his  
16 First Petition were denied on the merits and, thus, Petitioner's current claims are successive.  
17 NRS 34.810(2). As this Petition is successive, pursuant to NRS 34.810(2), it cannot be decided  
18 on the merits absent a showing of good cause and prejudice. NRS 34.810(3).

19 Petitioner's other claims constitute an abuse of the writ. McClesky, 499 U.S. at 497-  
20 98. Petitioner's claims of judicial bias were available to him prior to the filing of his direct  
21 appeal. Petitioner was the registered owner of a local business called "Top Knotch." See  
22 Petitioner's Exhibit B. On June 6, 2018, prior to Petitioner's sentencing in this matter, an  
23 article was published alleging that the Honorable Melanie Tobiasson was alleging that Top  
24 Knotch was a front for a prostitution ring and that her daughter as well as the daughter of the  
25 Honorable Michelle Leavitt were frequenting this establishment. See Petitioner's Exhibit C.  
26 As the registered owner of the business, Petitioner was on notice after June 6, 2018, that there  
27 may have been potential for bias in his case. Petitioner's First Petition was filed on February  
28 25, 2019, after Petitioner was on notice of this claim. Therefore, Petitioner's failure to raise

1 these claims of judicial bias in his First Petition constitute an abuse of the writ and Petitioner's  
2 claims are denied.

3 **b. Petitioner's Substantive Claims are Waived as they Should have been**  
4 **Raised on Direct Appeal.**

5 Under NRS 34.810,

6 1. The court *shall* dismiss a petition if the court determines that:

7 (a) The petitioner's conviction was upon a plea of guilty or  
8 guilty but mentally ill and the petition is not based upon an  
9 allegation that the plea was involuntarily or unknowingly entered  
10 or that the plea was entered without effective assistance of  
11 counsel.

12 ...

11 unless the court finds both cause for the failure to present the  
12 grounds and actual prejudice to the petitioner.

13 (emphasis added). Further, substantive claims are beyond the scope of habeas and waived.  
14 NRS 34.724(2)(a); Evans v. State, 117 Nev. 609, 646–47, 29 P.3d 498, 523 (2001); Franklin  
15 v. State, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), disapproved on other grounds,  
16 Thomas v. State, 115 Nev. 148, 979 P.2d 222 (1999).

17 As discussed, supra, Petitioner's claims of judicial bias were available to him when his  
18 direct appeal was filed. Petitioner declined to raise these claims on direct appeal and, thus,  
19 these claims are waived for habeas review. Therefore, Petitioner's claims are denied.

20 **III. PETITIONER CANNOT DEMONSTRATED GOOD CAUSE TO**  
21 **OVERCOME THE PROCEDURAL BARS.**

22 A showing of good cause and prejudice may overcome procedural bars. "To establish  
23 good cause, appellants *must* show that an impediment external to the defense prevented their  
24 compliance with the applicable procedural rule. A qualifying impediment might be shown  
25 where the factual or legal basis for a claim was not reasonably available at the time of default."  
26 Clem v. State, 119 Nev. 615, 621, 81 P.3d 521, 525 (2003) (emphasis added). The Court  
27 continued, "appellants cannot attempt to manufacture good cause[.]" Id. at 621, 81 P.3d at  
28 526. To find good cause there must be a "substantial reason; one that affords a legal excuse."



1 Hathaway v. State, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003) (quoting Colley v. State, 105  
2 Nev. 235, 236, 773 P.2d 1229, 1230 (1989)). Clearly, any delay in the filing of the petition  
3 must not be the fault of the petitioner. NRS 34.726(1)(a).

4 A petitioner raising good cause to excuse procedural default rules must do so within a  
5 reasonable time after the alleged good cause arises. See Pellegrini, 117 Nev. at 869-70, 34  
6 P.3d at 525-26 (holding that the time bar in NRS 34.726 applies to successive petitions); see  
7 generally Hathaway, 119 Nev. at 252-53, 71 P.3d at 506-07 (stating that a claim reasonably  
8 available to the petitioner during the statutory time period did not constitute good cause to  
9 excuse a delay in filing). A claim that is itself procedurally barred cannot constitute good  
10 cause. Riker, 121 Nev. at 235, 112 P.3d at 1077. See also Edwards v. Carpenter, 529 U.S. 446,  
11 453 120 S. Ct. 1587, 1592 (2000).

12 As demonstrated, supra, Petitioner's claims of judicial bias were available as early as  
13 June 6, 2018. However, Petitioner did not raise these claims until January 31, 2020,  
14 approximately eighteen months after the claim became available to him. Petitioner cannot  
15 demonstrate good cause to ignore his procedural defaults because all of the necessary facts  
16 and law were available for a timely filed direct appeal as well as Petitioner's First Petition for  
17 Writ of Habeas Corpus and he has not even alleged an impediment external to the defense  
18 prevented raising this claim at the appropriate time. As Petitioner's claims were available at  
19 the time he filed his first Petition for Writ of Habeas Corpus, Petitioner's claims cannot  
20 constitute good cause to overcome the procedural bars and Petitioner's Petition is dismissed.

#### 21 **IV. PETITIONER CANNOT DEMONSTRATE PREJUDICE.**

22 In order to establish prejudice, the defendant must show "not merely that the errors of  
23 [the proceedings] created possibility of prejudice, but that they worked to his actual and  
24 substantial disadvantage, in affecting the state proceedings with error of constitutional  
25 dimensions." Hogan v. Warden, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993) (quoting United  
26 States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596 (1982)). "Bare" and "naked"  
27 allegations are not sufficient to warrant post-conviction relief, nor are those belied and repelled  
28 by the record. Hargrove v. State, 100 Nev. 498, 502, 686 P.2d 222, 225 (1984). "A claim is

1 'belied' when it is contradicted or proven to be false by the record as it existed at the time the  
2 claim was made." Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

3 Petitioner cannot demonstrate prejudice because he has not presented facts sufficient to  
4 establish judicial bias. In Nevada, a judge is presumed to be not biased. Goldman v. Bryan,  
5 104 Nev. 644, 764 P.2d 1296 (1988) (overturned on other grounds, see Halverson v.  
6 Hardcastle, 123 Nev. 29, 163 P.3d 428 (2007)). The burden is on the party asserting bias "to  
7 establish sufficient factual grounds warranting disqualification." Goldman, 104 Nev. at 644,  
8 764 P.2d at 1296. A motion to disqualify will be insufficient where there are no facts that  
9 support a reasonable inference that a judge entertained bias against the defendant. Id. at 650,  
10 at 1300. Therefore, a defendant's bare allegation of bias is not sufficient to overcome the  
11 presumption that the court is not biased. Id. at 644, at 1296; Sonner v. State, 112 Nev. 1328,  
12 1335, 930 P.2d 707, 712 (1996). "[R]emarks of a judge made in the context of a court  
13 proceeding are not considered indicative of improper bias or prejudice unless they show that  
14 the judge has closed his or her mind to the presentation of all the evidence." Cameron v. State,  
15 114 Nev. 1281, 1283, 968 P.2d 1170, 1171 (1998).

16 Here, Petitioner's bare allegations are not sufficient to overcome the presumption  
17 against judicial bias. Regarding the Honorable Melanie Tobiasson, her comments regarding  
18 Petitioner were positive and reflect a lack of bias against him. See Petitioner's Exhibit B.  
19 Therefore, Petitioner's claim as to bias by Judge Tobiasson is belied by the record. Mann, 118  
20 Nev. at 354, 46 P.3d at 1230. Moreover, Petitioner has failed to demonstrate any bias on behalf  
21 of this Court. In fact, the Honorable Michelle Leavitt specifically stated that she was not  
22 involved in any comments that may have been made by Judge Tobiasson. See Petitioner's  
23 Exhibit C. Further, Chief Judge Linda Bell determined that there was no reason for this Court  
24 to recuse itself because Petitioner could not demonstrate a conflict of interest which would  
25 prevent this Court from being fair and impartial. Therefore, Petitioner has failed to  
26 demonstrate prejudice and his Petition is denied.

27 //

28 //

**V. THERE WAS NO CUMULATIVE ERROR.**

Petitioner further claims cumulative error warrants relief. Petition at 10. "Relevant factors to consider in evaluating a claim of cumulative error are (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 855 (2000). Petitioner did not contest the evidence at trial, instead, Petitioner elected to try and prove that he was not guilty by reason of insanity. Therefore, the issue of guilt was not close. Further, Petitioner has failed to allege a single instance of error and, therefore, his claim of cumulative error fails. See United States v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors."). Furthermore, any errors that occurred at trial were minimal in quantity and character, and a defendant "is not entitled to a perfect trial, but only a fair trial." Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975). Petitioner's claim is without merit and his Petition is denied.

**ORDER**

THEREFORE, IT IS HEREBY ORDERED that the Petition for Post-Conviction Relief shall be, and it is, hereby denied.

Dated this 25th day of June, 2020

DATED this \_\_\_\_ day of June, 2020.

188 D64 E237 66C1  
DISTRICT JUDGE

STEVEN B. WOLFSON  
Clark County District Attorney  
Nevada Bar #001565

Michelle Leavitt

BY

*Hagan Tupper* #10114 for

ALEXANDER G. CHEN  
Chief Deputy District Attorney  
Nevada Bar #10539



CERTIFICATE OF SERVICE

I certify that on the \_\_\_\_ day of \_\_\_\_, 2020, I mailed a copy of the foregoing proposed Findings of Fact, Conclusions of Law, and Order to:

MARLON LORENZO BROWN

BAC#1209358

P.O. BOX 208 (SDCC)

INDIAN SPRINGS, NEVADA 89070

BY

\_\_\_\_\_  
Secretary for the District Attorney's Office

14F13786X/AC/ss/mlb/dvu

Exhibit D

Nevada Supreme Court  
Order of affirmance  
Habeas Corpus Petition #3

Exhibit D

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARLON LORENZO BROWN,  
Appellant,  
vs.  
BRIAN WILLIAMS, WARDEN,  
Respondent.

No. 83314

**FILED**

NOV 30 2022

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY:   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal from a district court order denying appellant Marlon Lorenzo Brown's postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Steven R. Kosach, Senior Judge.

In December 2018, following a jury trial before the Honorable Michelle Leavitt, District Judge, Brown was convicted of 12 felony counts arising from a domestic violence incident. Brown appealed his conviction. In his direct appeal, among other things, Brown raised claims of judicial bias against Judge Leavitt. Certain portions of Brown's judicial bias claim included unsavory allegations against Judge Leavitt's family. Judge Leavitt moved to strike those portions of the briefing as scandalous. Brown filed a nonopposition to Judge Leavitt's motion. This court granted the motion and did not address any claim of judicial bias based on Brown's allegations related to Judge Leavitt's family.

While Brown's appeal was pending before this court, he filed a postconviction petition for a writ of habeas corpus in the district court. Brown's petition did not raise any claim of judicial bias against Judge Leavitt. In June 2019, Judge Leavitt denied Brown's habeas petition in a minute order, ruling that Brown failed to demonstrate ineffective assistance



of trial counsel and that the remainder of his claims were not appropriately raised.

After the minute order issued, Judge Leavitt recused herself from both Brown's criminal case and the habeas proceedings. Each were assigned to a different department. After her recusal, Judge Leavitt entered a written order denying Brown's habeas petition. The next day, the Honorable Michael Villani, District Judge, the presiding criminal judge, issued a minute order stating that Judge Leavitt's recusal had been made in error and reassigning the matter to Judge Leavitt.

With the matter back before Judge Leavitt, and while both Brown's direct appeal and the appeal from the denial of his first habeas petition were still pending, Brown filed a motion to disqualify Judge Leavitt and to vacate all of her prior rulings, including the judgment of conviction.<sup>1</sup> In his motion, Brown renewed his allegations of judicial bias against Judge Leavitt—including his allegations related to her family. In response, Judge Leavitt filed an affidavit acknowledging that she had recused herself from Brown's criminal case due to a conflict with Brown's attorney. However, Judge Leavitt asserted that she had no bias or prejudice against Brown and that she could impartially preside over his habeas proceedings. The Honorable Linda Bell, Chief District Judge, denied Brown's motion to disqualify, concluding that Judge Leavitt's rulings were not evidence of bias or prejudice and that there were insufficient factual grounds to establish a conflict of interest.

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<sup>1</sup>The court of appeals eventually affirmed the denial of Brown's first habeas petition. *Brown v. Williams*, No. 79128-COA, 2020 WL 1849273 (Nev. Ct. App. Apr. 10, 2020) (Order of Affirmance).

In January 2020, and with his appeals still pending, Brown filed a second habeas petition. In his second petition, Brown brought the same allegations of judicial bias against Judge Leavitt that he had raised previously on direct appeal and in his first motion to disqualify but did not raise in his first petition.<sup>2</sup> Brown also brought a second motion to disqualify Judge Leavitt from the habeas proceedings, once again raising the allegations of judicial bias. Judge Leavitt denied the second habeas petition, finding that Brown's second petition was successive to his first habeas petition and that he had not overcome this procedural bar by demonstrating good cause and prejudice. After Judge Leavitt denied Brown's second habeas petition, Chief Judge Bell denied Brown's second motion to disqualify, ruling that Brown had once again failed to establish sufficient grounds to warrant disqualifying Judge Leavitt. Brown did not appeal the denial of his second habeas petition.

In August 2020, Brown filed a third postconviction habeas petition. In addition to raising new claims, Brown's third petition once more alleged judicial bias against Judge Leavitt. He simultaneously brought a third motion to disqualify Judge Leavitt. In response, Judge Leavitt filed an affidavit stating, for the first time, that her recusal from Brown's habeas proceedings had been inadvertent. Chief Judge Bell denied Brown's third motion to disqualify, ruling that the third motion raised the same claims as the previous two and that Brown was therefore really requesting that the court reconsider its denial of those motions. Because Brown had failed to

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<sup>2</sup>This court affirmed Brown's conviction on direct appeal. *Brown v. State*, No. 77962, 2020 WL 3474157 (Nev. June 24, 2020) (Order of Affirmance).

request leave to file for reconsideration of the denial of his previous motions, Chief Judge Bell denied Brown's third motion to disqualify as untimely.

In March 2021, Chief Judge Bell issued a minute order changing the venue of Brown's habeas proceedings. The order noted that Judge Leavitt may be a potential witness in the proceedings and reassigned the case to the Honorable Steven R. Kosach, Senior Judge. Judge Kosach denied Brown's third habeas petition, determining that it was procedurally barred as successive to his second petition and that an evidentiary hearing was unwarranted. This appeal followed.

### *DISCUSSION*

Brown argues the district court erred in denying his third postconviction habeas petition as successive. He argues that Judge Leavitt's order denying his first petition is void because she entered it while she was recused. Brown further argues that the denials of his second and third petitions were based upon those petitions being successive to the first petition, rather than on the merits. Because neither the second nor third petition were preceded by an adjudication of his habeas claims on the merits, Brown argues, his third petition is not procedurally barred. We disagree.

This is Brown's third postconviction habeas petition and as such it is subject to multiple procedural bars.<sup>3</sup> "In reviewing the district court's application of the procedural default rules, we will give deference to its factual findings but will review the court's application of the law to those facts de novo." *Rippo v. State*, 134 Nev. 411, 415-16, 423 P.3d 1084, 1093 (2018) (internal quotation marks omitted).

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<sup>3</sup>We note that Brown's third petition is not time-barred because it was timely filed pursuant to NRS 34.726(1).



NRS 34.810(1)(b) establishes a waiver bar by which a court is required to dismiss a petition if the petitioner's conviction was the result of a trial and the grounds for relief could have been raised at trial, on direct appeal, in a prior habeas petition, or in a previous proceeding. For second or successive petitions, NRS 34.810(2) establishes two separate procedural bars. First, a petition is subject to the successive procedural bar if the judge determines that (1) the petition failed to allege new or different grounds for relief, and (2) the prior adjudication of the petitioner's claim or claims was on the merits (successive bar). *Id.* Second, if the petition alleges new or different grounds for relief, the petitioner's failure to assert those grounds in a prior petition may constitute an abuse of the writ (abuse-of-the-writ bar). *Id.* To overcome any of these procedural bars, a petitioner must demonstrate both good cause and prejudice. NRS 34.726(1); NRS 34.810(3).

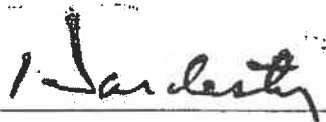
"[T]o demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). Such an impediment "may be demonstrated by a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials, made compliance impracticable." *Id.* (internal quotation marks omitted). Prejudice is demonstrated by an error that works to the petitioner's actual and substantial disadvantage. *See Hogan v. Warden*, 109 Nev. 952, 960, 860 P.2d 710, 716 (1993).

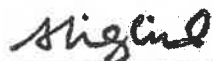
Here, assuming without deciding that the denial of Brown's first petition was void because Judge Leavitt entered the order while in recused status, Brown nevertheless fails to demonstrate good cause and prejudice to overcome the procedural bars that apply to his third habeas


petition. Specifically, Judge Leavitt ruled on Brown's second habeas petition once she had reentered the proceedings and that order is therefore valid. Brown failed to appeal from the denial of his second habeas petition and has therefore waived his ability to bring those claims in his third petition. *See* NRS 34.810(1)(b).

As to the new claims Brown brings in the instant petition, each were available to him to bring either on direct appeal or in a prior habeas petition. Accordingly, his failure to bring those claims earlier constitutes an abuse of the writ. *See* NRS 34.810(2). We acknowledge that Brown raises disconcerting allegations in his third petition. However, Brown failed to bring these claims on direct appeal or on appeal from the denial of his second habeas petition and he has not shown the good cause and prejudice needed to overcome the procedural bars his third petition implicates. Those procedural bars must be adhered to. Accordingly, we

ORDER the judgment of the district court AFFIRMED.<sup>4</sup>

 J.  
Hardesty

 J.  
Stiglich

 J.  
Herndon

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<sup>4</sup>To the extent the parties' additional arguments are not addressed herein, we have reviewed those arguments and we conclude they do not warrant a different result.

cc: Chief Judge, The Eighth Judicial District Court  
Hon. Steven R. Kosach, Senior Judge  
McAvoy Amaya & Revero, Attorneys  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk